(21,393.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 597.

E. M. DELK, PETITIONER,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No. 1747.

United States Circuit Court of Appeals, Sixth Circuit.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
E. M. DELK, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Tennessee.

Record.

Original Transcript Filed Sept. 18, 1907.

Transcript of Record.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886. Law.

E. M. DELK
vs.
KANSAS CITY, MEMPHIS AND BIRMINGHAM RAILROAD COMPANY and THE FRISCO R. R. Co., ST. LOUIS & SAN FRANCISCO R. R. Co.

Transcript from the Circuit Court of Shelby County, Tennessee.

Filed April 12th, 1907. Dan F. Elliotte, Clerk.

STATE OF TENNESSEE:

Pleas, at a term of the Circuit Court of Shelby county, division 1, state aforesaid, begun and held at the court house in the city of Memphis, on Monday, November 19, 1906, present and presiding the Hon. J. P. Young, judge, etc. Also present L. P. Thompson, clerk of said court, and F. L. Monteverde, sheriff of Shelby county, when the following proceedings were had, to-wit:

Pauper's Oath.

E. M. DELK
vs.
KANSAS CITY, MEMPHIS AND BIRMINGHAM RAILROAD COMPANY and THE FRISCO R. R. Co., ST. LOUIS & SAN FRANCISCO R. R. Co.

I, E. M. Delk, do solemnly swear that owing to my poverty I am not able to bear the expenses of the suit I am about to commence in

the Circuit Court of Shelby county, Tennessee, against the above named defendant-, and that I am justly entitled to the redress sought to the best of my belief.

Witness my hand this 31st day of October, 1906.

E. M. DELK.

Sworn to and subscribed before me this 31st day of October, 1906.

[SEAL.] O. H. GHRIST,
Notary Public.

Summons.

State of Tennessee to the Sheriff of Shelby County, Greeting:

You are hereby commanded to summon the Kansas City, Memphis & Birmingham Railroad Co., and the Frisco R. R. Co. and St. Louis & San Francisco R. R. Co., if to be found within your county, personally to be and appear before the judge of the Circuit Court of Shelby county, at a term of said court to be held for said county, at the court house in the city of Memphis on the third Monday in November next then and there to answer E. M. Delk in an action for damages for personal injury, foot mashed off by defective coupler. To plaintiff's damage $10,000.00.

Herein fail not, and have you then and there this writ.

Witness, L. P. Thompson, clerk of said court, at office, the third Monday in September, 1906.

L. P. THOMPSON, *Clerk,*
By WM. REISSER, *Deputy Clerk.*

Issued 1st day of Nov., 1906.

L. P. THOMPSON, *Clerk.*
WM. REISSER, *D. C.*

Sheriff's Return.

Came to hand 1st day of Nov., 1906, executed on St. Louis & San Francisco R. R. Co., by reading said writ to Sid Oliver, agent, he being the highest officer to be found in my county and after diligent search I am unable to locate any one to serve for the K. C. M. & B. R. R. Co., this Nov. 13, 1906.

F. L. MONTEVERDE, *Sheriff.*
THOS. DWYER, *D. S.*

E. M. DELK
vs.
THE FRISCO RAILROAD COMPANY or THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Declaration.

Filed Nov. 21, '06. C. A. Boswell, D. C.

Now comes the plaintiff and sues the defendant, a railroad company operating a system of railroads through the states of Tennessee, Arkansas and other states, common carriers of freight and passengers and engaged in interstate commerce, for ten thousand dollars ($10,000.00) as damages for this:

On to-wit the 4th day of October, 1906, while plaintiff was working as an employé of the defendant and as such employee coupling certain cars used in interstate commerce, plaintiff's right foot was permanently, seriously and painfully injured by reason of a defective coupler then being operated by the said defendant.

The defendant negligently, carelessly and recklessly in open defiance of chapter 196 of the Acts of Congress of 1893 failed to provide the plaintiff with a safety appliance with which to couple said cars.

The said cars were in what is called the new yard of the defendant in the city of Memphis, at or near where the Belt Line crosses the Frisco on Broadway and it was plaintiff's duty as switchman to couple said cars together.

The defendant had failed to provide proper automatic couplers, as provided by law, and it therefore, became necessary for plaintiff to go between the cars in order to make the coupling. The chain, which connects the lift rod and the lug, inside the drawhead, together, was gone and it became necessary for plaintiff to shove the drawhead over and hold it with his foot in order to make the coupling. While plaintiff was so holding the drawhead with his foot, the train backed up to make the coupling and the drawhead jumped off and threw his foot between the drawheads. Said chain with pin attached, as aforesaid, should have been properly attached to said car in order to open the knuckle and its absence was the proximate cause of the injury.

Or if said cars had been equipped as provided by the Act of Congress aforesaid, plaintiff would not have been injured, for it would not have been necessary for him to have used his foot in pushing back the drawhead.

By reason of the negligence on the part of this defendant, plaintiff's right foot was crushed to a pulp, the bones being fractured and sticking through the skin, from which plaintiff has suffered great pain, mental and physical, great expense and loss of time and is permanently injured.

Wherefore he sues the defendant for damages, actual and exemplary, as aforesaid and prays a jury to try the issues?

Second Count.

Plaintiff sues the defendant, a corporation, for other ten thousand ($10,000.00) dollars as damages for this:

On the 4th day of October, 1906, while plaintiff was in the employ of the defendant, as a switchman, it became his duty to couple two cars together. Said cars were being operated and controlled by the defendant in what is called its new yard in South Memphis and were being used in interstate commerce. They were not equipped with automatic couplers as provided by the Act of Congress under such circumstances, and it became necessary, because of same, for plaintiff to go between the cars and hold the draw bar back with his foot in order to affect the coupling. By reason of the defective condition of said coupler on said cars, plaintiff's foot was jerked between the drawhead of the cars and mashed into a pulp. The bones of his foot were crushed and broken and he was otherwise painfully maimed and mangled; from which injury he has suffered great pain and mental anguish and has been put to great expense for medical attention, has lost a great amount of time from his work. He still suffers and he is permanently injured.

Wherefore he sues for damages as aforesaid and prays a jury to try the issues.

T. F. KELLEY, *For Pl't'ff.*

Third Count.

Plaintiff sues the defendant, a corporation, for other ten thousand dollars ($10,000.00) damages for this:

On or about the 4th day of October, 1906, plaintiff's right foot was mangled, mashed and broken by reason of the defendant failing to furnish him a safe place to work.

Defendants were further negligent in failing to have an automatic coupler in good condition on said cars and in failing to have a safety appliance.

Said cars were being used in interstate commerce and it was the defendant's duty to provide such a coupler, as provided by the Act of Congress.

Because of such negligence, plaintiff suffered the injury as aforesaid, which caused his great pain, expense and loss of time to his damage, aforesaid, and prays the jury.

T. F. KELLY, *For Pl't'ff.*

In the Circuit Court of Shelby County, Tennessee.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

Petition for Removal.

Filed Nov. 23, '06. W. W. Thompson, D. C.

To the Hon. judge of the Circuit Court of Shelby county:

Comes your petitioner, St. Louis & San Francisco Railroad Company and shows and alleges to the court that the matter and amount in dispute in the above entitled cause exceeds, exclusive of interest and costs, the sum or value of two thousand ($2,000.00) dollars; that at the time when this suit was commenced, the plaintiff E. M. Delk, was and now is, a citizen of the State of Tennessee and resident of the Western District thereof.

That your petitioner, St. Louis & San Francisco Railroad Company, is defendant in said suit and was, at the time of the commencement thereof, and now is, a corporation, created and existing under the laws of the state of Missouri and under the laws of no other state; that this action is of a civil nature and that this petition is filed before any pleadings is due from it. That there is no such corporation or person legally known as the Frisco Railroad Company, and that this petitioner is sole defendant in said cause.

Petitioner tenders herewith a bond conditioned according to law, with good and sufficient surety for filing a copy of the record in this cause in the Circuit Court of the United States for the Western Division of the Western District of Tennessee and for paying all costs that may be there adjudged against it in case this cause is wrongfully or improperly removed thereto.

Petitioner prays that this cause may be removed to the Circuit Court of the United States for the Western Division of the Western District of Tennessee, and that this court proceed no further herein, except to order said cause removed.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By C. H. TRIMBLE, *Attorney.*

Bond.

Filed Nov. 23, '06. W. W. Thompson, Clerk.

The St. Louis & San Francisco Railroad Company as principal, and C. H. Trimble as surety, acknowledge themselves indebted to E. M. Delk in the sum of two hundred and fifty ($250) dollars, this obligation to be void in case said railroad company shall file in the Circuit Court of the United States, for the Western Division

of the Western District of Tennessee, on or before the first day of its next session, a copy of the record in a certain cause pending in the Circuit Court of Shelby county, Tennessee, wherein E. M. Delk is plaintiff and said railroad company is defendant, which said railroad company has petitioned said Circuit Court of Shelby county to order removed to said court of the United States and shall pay all costs that may be adjudged against it by said Circuit Court of the United States in case it shall hold that this suit is wrongfully or improperly removed thereto. Otherwise, this obligation is to remain in full force and virtue. Dated Nov. 22, 1906.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Principal,*
By C. H. TRIMBLE, *Attorney.*
C. H. TRIMBLE, *Surety.*

Petition and Bond Presented.

November Term, 1906.

E. M. DELK
vs.
ST. L. & S. F. R. R. CO. ET AL.

FRIDAY, *November* 23, 1906.

Came the defendant St. Louis & San Francisco R. R. Co. and presented to the court its petition and bond for the removal of this cause, whereupon the same was ordered filed in this cause.

Order for Removal.

November Term, 1906.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

FRIDAY, *January* 4, 1907.

In this case, it is ordered by the court, that the defendant's petition for removal be, and it is hereby granted.

STATE OF TENNESSEE:

I, L. P. Thompson, clerk of the Circuit Court of Shelby county, hereby certify that the foregoing 11 pages of words and figures contain a full, true and complete transcript of all the records and proceedings had in the suit therein named, wherein E. M. Delk is the plaintiff and the St. L. & S. F. R. R. Co., the defendant as the same appears of record and on file in my office.

In testimony whereof, I hereto subscribe my name and affix the

seal of said court at my office in the city of Memphis, Shelby county, this the 9th day of April, 1907.

[SEAL.] L. P. THOMPSON, *Clerk*,
By WM. REISSER, *Deputy Clerk*.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term A. D. 1906, at the United States Court House in the city of Memphis, in said District, on to-wit the 12th day of April A. D. 1907, in the following cause, to-wit.

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO. ET AL.

This day comes the defendants by their solicitors and presents to the court a transcript on the removal thereof, to this court from the Circuit Court of Shelby County, Tennessee, and moves the court for leave to file and docket the same, which motion is hereby granted. It is therefore ordered by the court that the transcript be filed and placed upon the Docket of this court.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO R. R. CO.

Pleas of the Defendant.

Filed May 29, 1907. Dan F. Elliotte, Clerk.

Comes the St. Louis & San Francisco Railroad Company for answer to the declaration herein filed, says:

1st. It is not guilty of the matters and things in the declaration alleged against it in the first count, in the manner and form stated.

2d. It denies that it is guilty of the matters and things alleged against it in the second count, in the manner and form stated.

3d. It denies that it is guilty of the matters and things alleged

against it in the third count of the declaration in the manner and form stated.

4th. For further plea to the whole declaration, it says, that the plaintiff was guilty of want of care without which the injury would not have occurred, in this: that he unnecessarily used his foot in order to shove over the knuckle of the drawhead and he carelessly allowed his foot to remain in that position until the cars came together. That the car was standing upon a curve and was, for this reason, difficult to couple and that this fact was well known to plaintiff, or should have been known to him in the exercise of ordinary care.

C. H. TRIMBLE, *Attorney.*

E. M. DELK
vs.
THE ST. LOUIS & SAN FRANCISCO R. R. CO.

Come the plaintiff and joins issue on defendant's pleas.

T. F. KELLY,
Attorney for Plaintiff.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May Term, A. D. 1907, at the United States Court House in the city of Memphis, in said District on to-wit the 19th day of June, A. D. 1907, in the following cause, to-wit:

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

This day came the plaintiff by his attorney when this suit came on to be and was heard upon the said plaintiff's motion for leave to file two additional counts to his declaration herein the same to be known as counts four and five, which motion upon consideration by the court was allowed and the defendant granted five (5) days within which to further plead, or demur thereto.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886. Law.

E. M. DELK
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD CO.

Amendments to Declaration.

Filed June 19, 1907. Dan F. Elliotte, Clerk.

Fourth Count.

Comes the plaintiff and after leave of the court first had and obtained, files this the amended counts to his declaration and sues the defendant, a corporation, engaged in operating a system of steam railroad in and through Tennessee and adjoining states, common carriers of freight and passengers and engaged in interstate commerce for other ten thousand ($10,000.00) dollars as damages for this.

On October 4, 1906, plaintiff was in the employ of defendant as a switchman. On said date plaintiff was ordered by his superior to get two empty cars to load for a concern at Mobile, Alabama. Plaintiff was working at defendant's new yard at the K. C. Junction in Memphis, Tennessee and attempted to get said cars. They were on what was known as the team track where cars are placed to be loaded and unloaded and temporarily placed while in transit to other points in and out of this state. Said car had been turned down by the Belt Line R. R. because of this defect and had been on this track for repairs three days when it could have been repaired in five minutes and plaintiff thought that it had been repaired until he had to couple it. In order to get the two empty cars, plaintiff had to move several loaded cars from other states on said team track. These cars were all being used in interstate commerce.

While trying to carry out said order and in endeavoring to make a necessary coupling plaintiff was desperately and permanently injured. The safety appliance required by law was gone from box car, to-wit number 21,696 S. & M. or rather the chain which connects the left rod and the lug together in the drawhead was broken off and gone and it was absolutely necessary to couple said car at said time. The car was loaded, and at the time was being used in interstate commerce. The car would not couple by impact. It therefore, became necessary for plaintiff to go between the cars to effect the coupling, he tried to make the coupling without remaining for the impact, but on account of the defect aforesaid, the knuckle of the drawhead of car No. 21,696 would not open and the force of the impact caused the drawhead to swerve over toward plaintiff and said drawhead had to be pushed back as the drawheads would meet

on the impact. Plaintiff strove to do this with his hands, but was not able to do so. Whereupon he placed his foot on the side of jaw of the drawhead and grasping the guard iron on the side of the car for leverage, he tried to push the drawhead back in place and open the knuckle. While so engaged the engineer negligently backed the drawheads together without a signal from plaintiff and without plaintiff's knowledge and caught plaintiff's foot between said drawheads, mashing, mangling and permanently disfiguring and disabling his foot.

Plaintiff had made three efforts to couple said car and each time the engineer moved the train by signal from plaintiff, as it was customary to move it, and the engineer did not back up until said signals were given.

Plaintiff therefore, relied upon said train not moving back to make said coupling this fourth time until plaintiff signalled his readiness, but the engineer did not wait a signal as aforesaid.

Because of defendant's failure to provide said car with the appliances aforesaid, plaintiff was compelled to go between the cars as aforesaid and suffered the injury as aforesaid. From which injury plaintiff has suffered great pain and mental and physical, loss of time and expense, he still suffers and is permanently maimed and crippled. Wherefore he sues for damages actual and exemplary and prays a jury to try the issues.

T. F. KELLY,
Attorney for Plaintiff.

Fifth Count.

Plaintiff sues the defendant, a corporation for other ten thousand ($10,000.00) dollars as damages for negligently, carelessly and recklessly mashing plaintiff's foot, crushing the bones in said foot and permanently injuring it.

The proximate cause of said injury was the failure on the part of defendant to furnish plaintiff a safe place to work and its failure to furnish him safe material and appliances with which to work.

From which injury plaintiff has suffered great pain, expense, loss of time and still suffers to his damages aforesaid and prays a jury to try the issues.

T. F. KELLY,
For Plaintiff.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

Plea of Defendant to Amended Declaration.

Filed June 26, 1907. Dan F. Elliotte, Clerk.

Comes the defendant, the St. Louis & San Francisco Railroad Company, and for plea to the fourth count of the declaration filed on the 19th of June, 1907, says:

1st. It is not guilty of the matters and things therein laid to its charge, in the manner and form therein stated.

C. H. TRIMBLE, *Attorney.*

2d. For further plea to the 4th count of said declaration, it says, that the plaintiff was guilty of negligence which contributed to produce the injury and without which it would not have happened in this, that he unnecessarily used his foot to move the drawbar and allowed his foot to remain in that position until it was struck.

C. H. TRIMBLE, *Attorney.*

Comes the plaintiff and joins issue on the above pleas.

T. F. KELLY,
Attorney for Plaintiff.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

Demurrer to Fifth Count of Amended Declaration.

Filed June 26, 1907. Dan F. Elliotte, Clerk.

Comes the defendant, St. Louis & San Francisco Railroad Company, and demurs to the fifth count of the declaration herein filed on the 19th day of June, 1907, and says that the specifications and negligence therein contained are general and indefinite, and that it does not state with particularity wherein this defendant failed to

furnish the plaintiff with a safe place to work, nor wherein it failed to furnish him safe material and appliances with which to work, and prays judgment of the court whether it ought to be compelled to make further or other answer to said count of said declaration.

C. H. TRIMBLE, *Attorney.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May Term, A. D. 1907, at the United States Court House in the city of Memphis, in said District, on to-wit the 27th day of June A. D. 1907, in the following cause, to-wit:

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO R. R. CO.

This cause came on to be heard upon the demurrer of the said defendant to the fifth count of Plaintiff's declaration, and the same having been heard and understood by the court, and by consent of counsel for the said plaintiff, is sustained. Plaintiff declines to amend and moves the court to be permitted to withdraw the said fifth count which is accordingly allowed and the said fifth count will be stricken from the files.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

Three Special Requests by Plaintiff.

Filed June 27th, 1907. Dan F. Elliottee, Clerk.

Employers' Liability Act.

If you find from the evidence that the plaintiff was guilty of contributory negligence in putting his foot on the side of the draw head to make said coupling, but you further find that the defendant, in

failing to have a safety appliance as provided by law, was guilty of gross negligence, in comparison with plaintiff's negligence, then you will still find for the plaintiff, but you must reduce his damages in proportion to his negligence.

Declined.

McCALL, *Judge.*

2.

The burden of the proof is on the defendant to make out the defense of contributory negligence.

Declined.

McCALL, *Judge.*

3.

If the jury find from the evidence that the proximate cause of the injury was that the engineer moved the train in a negligent manner, so rapidly as to cause the plaintiff's foot to slip and get caught your verdict should be for the plaintiff.

Declined.

McCALL, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court, at a regular term thereof begun and held for its May Term, A. D. 1907, at the United States Court House in the City of Memphis, in said District, on to-wit the 27th day of June, A. D. 1907, in the following cause, to-wit:

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

This day came the said defendant by its solicitor and the plaintiff with his solicitors and also a jury of good and lawful men, to-wit: R. E. L. Woodward, A. M. Durham, J. T. Forsythe, W. S. Latta, R. A. Shields, W. B. Weisiger, W. J. Booker, Fred T. Anderson, Jas. F. Graham, G. W. O. Miller, Taylor Wilson and W. H. Woods, who being duly elected, empanneled, tried and sworn well and truly to try the issue herein joined and a true verdict render according to the law and the evidence, and the jury having heard the evidence listened to the argument of counsel and received the charge of the Court, upon their oaths do say they found the issue herein joined to be in favor of the plaintiff and against the defendant and assess the amount of plaintiff's damage and recovery herein

against the said defendant at the sum of seven thousand, five hundred Dollars ($7500.00). It is therefore considered by the Court that the plaintiff E. M. Delk do have and recover of and from the defendant the St. Louis & San Francisco Railroad Company said sum of Seven Thousand five hundred Dollars ($7500.00) together with the costs of this suit, for the collection of which execution is hereby awarded.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court, at a regular term thereof begun and held for its May Term, A. D. 1907, at the United States Court House in the City of Memphis, in said District, on to-wit the 10th day of July, A. D. 1907, in the following cause, to-wit:

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

This day came on this suit to be and was heard upon the Defendant's Motion for a new trial upon the grounds as assigned in its written motion filed herein, and upon consideration whereof the Court is pleased to and doth grant said motion unless the plaintiff shall enter a remittitur of Twenty-five hundred dollars ($2500.00) thereby reducing his verdict and judgment thereon to Five Thousand Dollars ($5000.00). Thereupon came the plaintiff and stated to the Court that he agreed to and accepted the rulings of the Court, and enters his remittitur for said sum of Twenty-five hundred Dollars ($2500.00). It is therefore ordered that the said motion for a new trial be and it is hereby overruled and that the judgment hereinbefore entered on the verdict of the jury in this suit be corrected accordingly and that the plaintiff do have and recover of and from the defendant the sum of Five thousand dollars ($5000.00) and not the sum of Seventy-five Hundred dollars ($7500.00) and that plaintiff also recover all the costs of this suit, for the collection of which execution is hereby awarded. To the rulings of the Court the defendant then and there excepted.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

Bill of Exceptions.

Filed August 12th, 1907. Dan F. Elliotte, Clerk.

Be it remembered, that this cause came on for trial on the 27th day of June, 1907, before Hon. John E. McCall, Judge presiding and a jury, and the following proceedings were had.

Both parties announced themselves ready for trial, plaintiff appearing by T. F. Kelley, Esq., and W. A. Percy, Esq., his attorneys and defendant appearing by C. H. Trimble, Esq., its attorney.

To sustain the issues upon his part, the plaintiff introduced the following evidence:

Plaintiff's Evidence.

Dr. W. B. BURNS, a witness for the plaintiff being first duly sworn, testified as follows:

Direct examination of the witness by Mr. KELLEY:

Q. State your name and business to the jury?

A. My name is W. B. Burns; I am physician and surgeon.

Q. How long have you been a physician and surgeon, and from what college did you graduate?

A. I have been practicing medicine fifteen years. I graduated from the Kentucky school of Medicine, Louisville, Ky., June, 1892.

Q. Where do you practice medicine?

A. Memphis.

Q. State whether or not you are the surgeon, local surgeon of the St. Louis & San Francisco Railroad Company?

A. I am the Division Surgeon for the Frisco Railroad.

Q. State Doctor, whether or not you were called upon to wait on this plaintiff, E. M. Delk, and about when and what you found, in your own way?

A. Well I was called to see Mr. Delk some time in October, I don't remember the date; I haven't seen the records recently.

Q. That is October, 1906?

A. October, 1906, yes, sir.

Q. Just explain to the jury what you found?

A. Well, I found his left foot I think crushed and the soft tissues were severely bruised and lacerated and I think one bone was broken; that's my recollection.

Q. Did you make a report on it at that time?
A. Yes, sir, I made a report.
Q. Have you got that report?
A. I haven't the report, no, sir; I sent that in to the Chief Surgeon.

Mr. KELLY: I'd like to have that report, and call upon you for it, Mr. Trimble.
The COURT: I don't know of any way that I can get it for you.
Mr. KELLY: Well we just call upon the defendant to furnish it; they have it.
The COURT: You can do that.

Q. How long was he confined to his bed with this injury?
A. Well, he was confined to the house, I don't remember now, it was quite a while; I'd like to have—there is a record and I have no desire to state anything except the truth and I'd like to have the record if Mr. Trimble will let me have it to refresh my memory.

Mr. TRIMBLE: Doctor, if you want it; I am perfectly willing to let you have it, if I've got it; I don't know whether I have it or not.
The WITNESS: I think I made a final report in the case which will probably show just—I made one report to Mr. Balch from memory and I made an official statement to the chief surgeon which gives the time confined to his house; and he is still coming to the office.

Q. You state that he is still coming to the office?
A. Yes, sir.
Q. What is the condition of the foot now?
A. Well, the foot is still open. There was a period of probably thirty days when the wound was closed and he didn't come to the office, but about two weeks ago or may be three weeks, between two and three weeks ago, the wound became again inflamed and it was necessary to open it again and for that reason he is still coming to the office.
Q. What did you remove when you opened it before this last time?
A. Well, I removed some scales of dead bone, what they call careas necrosis; there was no well defined spiculum of bone, no piece of bone, but just some scales that shelled off of the surface of the bone.
Q. Do you know whether or not you got all those scales, Doctor?
A. Well, I think I did. I tried to get them all; this is the third time that the foot has been opened, third time that the foot has been opened to remove dead bone.
Q. How long since you made the most recent opening?
A. Well, it was out at the city hospital, I think it was on Tuesday, wasn't?

Mrs. DELK: The 11th, yes.
The WITNESS: On the 11th of June. (Reports are handed to the witness, who reads them).

The WITNESS: I see here that it was the right foot that I made the report on. I don't remember unless I could see it.

Mr. TRIMBLE: Come over here and have an ocular inspection of it.

The WITNESS: Well, I don't remember unless I could remember the position the man was in when I was dressing him. It was the right foot and was contused. The first metatarsal bone was broken; the soft tissues was pulpified and the skin burst in three places. Gauze was put in the openings for drainage and a hot bichloride of mercury pack was put on and ordered kept hot. That's the report to the chief surgeon. I see here is a copy of a report that I made on the request of Mr. Balch, copy of the final report that I made to the chief surgeon, which says: "This report is mailed on February 23rd, this final report says, in describing the injuries, there was a crushed foot, a compound fracture, dislocation of bones of metatarsal and tarsal bones; there was only a fracture of one bone, but in the crushing the joints were dislocated; there was dislocation of the bones. Now the history of the case; the openings in the foot received fairly good drainage; the drains were put in and the foot antiseptically dressed and kept in hot bichloride packs, and there was never any considerable amount of infection. A necrosis of bone and periostitis requiring two operations for removal of necrosed bone; those are the two operations and there's no date here as to when those two operations were done, but they were probably——

Q. When did you call upon him the first time?

A. The report shows here that he was injured October 4th.

Q. When was that report made?

A. That report was made on November 1st.

Q. The next report that you read, when was that made?

A. The original report was made on February 23rd, and the copy of this report was sent to Mr. Balch on May 15th.

Q. You state that at that time you had operated twice to remove this sloughing bone?

A. This sloughing of the bone, yes, sir.

Q. Since that time I believe you said you have had to operate again?

A. The report says here he was dressed the last time February 23rd, the wounds were healed.

Q. Well, I say now subsequent to that, as I understand you, you had to operate, open the foot again to remove this sloughing bone, since that time?

A. Since that time; I understand it was June 11th, I don't remember just exactly, but it was just a few days ago; June 11th.

Q. Has he at any time since he was injured been able to attend to his duties as a switchman, walking around, coupling cars and things of that sort?

A. No, sir; I think not.

Q. Can you give the jury any sort of an idea about how long he will be disabled; I mean disabled from his work?

A. There is a statement there that I made in the report that I wanted to read and I'll read that if they'll let me; here it is. Now

in answer to the question here: "Is the patient disabled from following his former occupation?" The answer to that is: "Yes, for the present, at least." And the answer to the question: "If not, how soon can he safely resume?" I say: "Problematical."

Q. Problematical?

A. Yes, sir, the extent of the permanent disability I say "there is yet marked thickening of all of the structures of the foot and it is problematical what passive motion and massage will do." That was before the last operation and of course that answer would still apply as soon as the wound healed.

Q. So, then, you cannot tell when this wound will be so that he can resume work, if ever?

A. Well, no; I say that it is problematical as to how soon he will be able to return to work. I think he will in time have a serviceable foot and will probably be able to follow his occupation.

Q. Will that foot ever be as strong as it was before that?

A. No; no, it won't.

Q. Did the patient suffer any pain from this, any particular amount of pain?

A. Yes, I presume so. I've no doubt but that he suffered a great deal of pain. You have to depend on the person's statement as to pain, you can't tell how bad a thing hurts; I've no doubt but what he suffered a great deal of pain.

Q. State whether or not he would be susceptible to rheumatic troubles or changes of the weather, if this foot would probably hurt him again?

A. Well, injuries to the bones and joints are followed in after years by more or less pain during cloudy weather; I think that's a fact well known by the layman as well as the physician.

Q. You think it probable that he will suffer more or less the rest of his life from this?

A. Well, I wouldn't say that; I would say that it is possible that for a period of years, five or ten years, he may have more or less pain in cloudy weather.

Q. Did you treat Mr. Delk in your official capacity as surgeon of the railroad company or as a private patient?

A. I made one visit as surgeon of the company, that is for the Employees Hospital Association. The rules of the Hospital Association require one visit and that is more to find out the condition of the patient and find whether or not he is entitled to hospital treatment, and if so to recommend hospital treatment to him, and the rule requires that they should be sent to the hospital, I mean the general hospital at St. Louis or Springfield. He refused to go to the hospital, preferring to stay at home and I was on the point of dismissing him so far as I was concerned, but he asked me to continue as his private surgeon and of course I'm not throwing away any business and I took charge of the case as a private patient and have treated him continuously from that time to this as a private patient.

Q. Do you know what was the cost to Mr. Delk of medical services, etc., up to date, so far as you know? Do you know how much it is?

A. Well, it's in the neighborhood of $200.

Q. You mean that's your bill?

A. That's my bill, maybe more, it was $200 before this last operation; may amount to $250 probably.

Q. You stated that you looked to Mr. Delk for that?

A. Oh, yes; I've no other means of collecting it.

Q. How many times has it been necessary for him to visit your office? How often, since he was hurt?

A. Well, he been coming to the office, when I dismissed him at the house, and I don't remember when I last saw him at the house, but I saw him at the office sometimes every day, sometimes every other day and sometimes every fourth day, and when he began coming to the office I dressed him about every third or fourth day and when the wound seemed to require it, he came to the office every day.

Q. And he has been doing that ever since October 4th?

A. Ever since October 4th, up to February 23rd. I state in there to see that he came to the office the last time on the 23rd of February, and the wound has been practically closed up to—practically closed, if the statements there are correct and I would rather rely on those statements than my memory, the wound was practically closed from February 23rd until a few days prior to June 11th; then I opened it again.

Q. State whether or not it swelled again, swelled up to a large size?

A. Yes, sir; it swelled up and puss formed in the track of the original sinus leading down to the bone that was broken, the first metatarsal bone.

Q. Is there any way of telling whether or not it will swell up and you have to cut it open again?

A. No, sir; there's no way of telling.

Q. As a matter of fact it may?

A. It may; I thought—I felt pretty safe that we had it closed on February 23rd, but necrosis of bone may occur again and it may be necessary——

Q. You stated that it might be made better by massaging it?

A. Massage, that's rubbing, by moving the joints and rubbing?

The COURT: Did he state it might be improved by that or it might be caused to inflame again by that?

The WITNESS: No, in my report to the chief surgeon I said that the structures were still thickened and the joints were stiff to some extent and that it was problematical as to what massage would do for it; I meant by that that massage would be a good thing and would help to carry off the thickening and held to loosen the joints and make them more supple.

Q. Massage means rubbing and manipulating?

A. Yes, sir.

Q. Who would do that, who would you have to do work of that character?

A. Well, a masseur.

Q. That is a person skilled in that business?
A. Yes, for instance there are several here in town, very good ones.
Q. What is the cost of each treatment for that, if you know?

Question objected to by the defendant.

The COURT: You are not asking what he has paid? You are asking what he would pay in case he underwent it.
Mr. KELLY: I just want to know whether or not it's expensive.
The COURT: That's immaterial, whether it's expensive or not, unless he employes him.
Mr. PERCY: We desire to reserve an exception to the court's ruling.
The COURT: Let him put his question squarely again.

Q. This massage treatment, state whether or not it is expensive?

Mr. TRIMBLE: That is objected to on the ground that it goes to the measure of damages and is speculative altogether.
The COURT: The objection is good. There is no proof here tending to show that he has undergone it or is contemplating any such thing. The jury might allow him damages for that and he not undergo the treatment.

Q. Is a man's foot a nerve center and would an injury of that sort disturb the nervous organism?
A. Well, it's not a nerve center; it is supplied with nerve lines and the severing of a nerve will produce pain.
Q. Will it produce any disturbance after the severance of it? I mean where this foot was?
A. What kind of disturbance?
Q. I mean sensitiveness to pain in the future?
A. Well, a severed nerve is painful at the time of the injury and until it is repaired and may be more or less sensitive for some time afterwards.
Q. I'd like for you to explain from this young man's foot, the way the injury was, where the holes were?

The COURT: What is the purpose of that?
Mr. KELLY: I wanted to show the foot, the nature of the injuries to the foot.
The COURT: He stated to the jury what the injuries were, what the nature of the injuries was.
Mr. KELLY: And the condition of the foot at the present time.
The COURT: He stated that.
Mr. KELLY: Well, we just wanted the jury to see it.

(At Mr. Kelly's request the plaintiff goes around in front of the jury, takes off his shoe and sock and removed the bandages from his foot.)

Q. Another question I wanted to ask you to get it in the record—is there any permanent disfiguration of the foot?
A. Yes, sir.
Q. In what respect is it disfigured?

A. Well, from the incisions on the side of the foot, it shows a rather deep sinus there, soft tissue and there's some displacement on account of the thickening of the toes; they stand up.

Q. (Will you please remove that bandage)?

(Plaintiff removes the bandage.)

A. There's one of the wicks in the top of the foot now, I just removed one of the wicks from the top of the foot. You see there now, you want the jury to see the disfigurement, it is shown there better than I can tell it.

Q. Is there a disfigurement on the top of the foot? Describe that so I can get it in the record?

A. There is a sinus on top of the foot now, leading down.

Q. I wish you would describe that disfiguration?

A. I said that there was from the incisions into the side of the foot, that there is now a large scar and near the scar will be another scar from the——

Q. Can he move his toes as freely as he could before the accident?

A. He can move the toes, but not as freely.

Q. Why?

A. Because of the injury.

Q. Were these bones up next to the small toes there broken?

A. No, no; the only bones broken were broken right here; this bone is broken.

Q. What occurred to those bones there where the sunken place is?

A. All the soft tissue in there was bruised and some it sloughed out and the joints here were dislocated.

Q. How much bone was taken out of the foot there? Did you remove any bone?

A. I said I removed some scales of bone, the peeling off the bone, it's all the same thing as an ulcer, ulceration of soft tissue.

Q. How many bones are affected by this mashed place over here on the top of the foot that you had reference to, here on the right?

A. Well, that comes down and this opening here comes down on the inside of this fractured bone over here, something runs across here you know and it's been opened there and curetted in here.

Q. How many bones were affected by that?

A. There was more or less displacement of all the bones here.

Q. How many bones are there here?

A. There's five, five and a tarsal bone, four bones besides the one that's broken.

Q. I believe I asked you what your bill was?

A. Yes.

Cross-examination by Mr. TRIMBLE:

Q. When that foot heals up, it will not look nearly so bad as that, will it?

A. No, it won't look so bad.

Q. You made that big hole there in the side of the foot yourself?

A. That one on the side of the foot?

Q. Yes, you cut that open, that's where you made an incision in there?

A. Yes, I made an incision on that side; there were three openings in the beginning, two are on the top and I believe that the third opening was on that side at that point, the first sinus was there, I opened, enlarged the opening at that point.

Q. They all healed up and in February you thought he was cured?

A. I thought he was all right in February. I had done one operation before that.

Q. The foot swelled up again and on the 11th of June you made this opening that you see now?

A. Yes, sir.

Q. And you are expecting that to heal some of these days?

A. Yes, sir; it's healing very rapidly.

Q. Healing rapidly now?

A. Yes, sir.

Q. Do you think the reasonable probability is that he will be able to use that foot and walk on it without crutches?

A. Yes, sir; in the course of time; I think that's problematical. I don't know how soon that will be. I feel sure that he'll have a serviceable foot.

Mr. McGregor, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Kelly:

Q. Have you brought the records of car 2696 up?

A. I've brought what records we have in the local office.

Mr. Kelly (to the Court): We have just issued a *subpœna duces tecum* for this witness to bring the record of this car to show where it was billed. We just want to see that record for him to explain it.

A. The car was billed from——

Q. What is the number of the car?

A. S. & M. 21696.

Q. All right?

A. Was billed from Giles, Ark., to Memphis, Tenn., oak lumber, consigned to J. P. Sullivan Lumber Co.

Q. In Memphis?

A. Yes, sir.

Q. When did it reach Memphis?

A. September 28th at 4:30 p. m.

Q. Does the record show what was done with it then?

A. The next record I have of the movement of the car was Oct. 2nd, delivered from our yard to the Belt, by Foreman Delk.

The Court: That is this plaintiff here?

A. Yes, sir.

Q. What was done with it then?

A. The next record I have of it it is returned by the Belt October 3rd, at 7:30 a. m.

Q. Well, what was it returned for?

A. I don't know.

Q. Does the record show?

A. No.

Q. Then, what became of it?

A. The car was then placed in our new yard, what is known as our new yard at Kansas City Junction.

Q. Why was it placed there?

A. The Belt Line placed it there.

Q. Why was it placed there, do you know?

A. No, sir.

Q. That was on October 2nd it was returned; was it loaded at that time?

A. It so states, the record so states.

Q. What was it loaded with?

A. Lumber I assume; I don't know.

Q. How long before that car was unloaded?

A. That I don't know; it wasn't unloaded on our tracks.

Q. Is all that the record shows about that car?

A. Yes, sir; except it shows that on October 4, the car was in the new yard and October 5th it was on what is known as our dead track.

Q. On October 5th?

A. Yes, sir; and on Oct. 6th was on new track No. 1. On Oct. 8th the same record.

Q. Where was it on October 4?

A. In the new yard.

Q. Where is that?

A. That is at Kansas City Junction.

The COURT: Was it loaded then?

A. I assume so.

Q. It was on October 4th then it was in the new yard and on October 5th it was carried to the dead track?

A. Yes, which is contiguous to the new yard.

Q. Why do you call it the dead track?

A. The only reason I know is that it's near the cemetery?

Q. Near the cemetery?

A. Leads off from the cemetery.

Q. You say that this dead track is at Kansas City Junction?

A. Contiguous to the Kansas City Junction; yes, sir.

Q. Now, you say the record shows who removed the car over to the Belt?

The COURT:

A. We can't go over that testimony again; if you don't understand or the jury don't understand what he says, the witness can state it, but we can't repeat it and repeat it just to have it repeated.

Mr. KELLY: I didn't understand.
The COURT: If you didn't understand, he can repeat it.
WITNESS: You want the first movement to the Belt?
Mr. KELLY: Yes, sir.
WITNESS: Oct. 2, by Foreman Delk.

Q. Does the record show that?
A. This is his record, he made it.
Q. It was moved over there in transit, was it?
A. Yes, sir.

Cross-examination by Mr. TRIMBLE:

Q. I understood the consignee to be Sullivan & Co.?
A. J. P. Sullivan Lumber Co.
Q. Where are their works?
A. They are located on the Belt Line; the exact location I don't know.
Q. By the Belt Line you mean the Union Railway Co?
A. Yes, sir.
Q. A line that goes around the city of Memphis?
A. Yes, sir.
Q. This car came here from Giles, Ark.?
A. Yes, sir.
Q. Where is Giles?
A. Giles is a station on the Osceola, Little River & Western Railroad.
Q. That dead track that you speak of out there, do you know whether or not that's used any differently from any other track?
A. It's at times used as a repair track.
Q. You say you have a record that this car was in the new yard on October 3rd?
A. Yes, sir.
Q. And on October 4 it was also in the new yard?
A. Yes, sir.
Q. And on October 5th it was as you say on the dead track; now where is the dead track with reference to this new yard that you are talking about?
A. It's probably two hundred yards west of the new yard.
Q. Who made that record you are speaking of?
A. Yard Clerk Rose made the record of the car on the 3rd.
Q. That's a report, what you have in your hand is a report turned in by Rose?
A. Yes, sir.
Q. Made in his own handwriting?
A. Yes, sir.
Q. He goes around every morning and takes a list of the cars on each track, is that the way of it?
A. That's his business.
Q. The company does that each day?
A. Yes, sir.

Redirect examination by Mr. KELLY:

Q. Where is the regular repair track where nothing but bad order cars are kept?

A. We've got a repair track in the main yard, that's near the river.

Q. That's called the hospital track, where nothing but bad order cars are kept?

A. Known as a rip track.

Q. You say out here at this new yard, trains are made up and distributed out there?

A. Occasionally.

Q. It's just the general handling of trains in that yard?

A. There's some switching done there, breaking up.

Q. How far from this new yard is this hospital or regular repair track where nothing but bad order cars are kept?

A. Between two and a half and three miles.

Recross-examination.

By Mr. TRIMBLE:

Q. Do you know whether it's customary to send a car to what they call the bad order track that you speak of, this yard two and a half miles away, every time a coupling is out of repair?

(Question objected to by plaintiff as not in response to anything brought out on the re-direct examination.)

Objection overruled.

Mr. PERCY: I object to the question on the further ground that it doesn't make any difference what the custom was, if the car was out of repair it was their business to repair it whether it was the custom to take it to the main hospital track or repair it somewhere else is not material in this case.

Mr. TRIMBLE: I'll ask what repairs are done in that yard you speak of, two and a half miles from this place?

A. Frequently light repairs are made.

Q. The general repair yard, where was that? Is that the one you are speaking of two and a half miles from this yard?

A. The general repair track?

Q. Yes, the general repair yard that you speak of, two and a half miles from this dead track?

A. About that?

The COURT: Where is it?

A. In the main yard, west, by the river.

Q. What kind of repairs are done in that yard?

A. All kinds, heavy and light.

Q. I understood you to say that when you are talking about light repairs being made, that they were made out here at times at this new yard?

A. Yes, when the cars were there; we wouldn't take a car from the main yard out there to make a light repair on it.

E. M. DELK, the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. KELLY:

Q. State your name to the jury?
A. E. M. Delk.
Q. Where do you live?
A. 577 Alabama Street.
Q. In Memphis, Tenn.?
A. Yes, sir.
Q. How old are you?
A. I'll be 26 on the 31st day of October.
Q. Are you married or single?
A. Married.
Q. Any family?
A. Only a wife.
Q. One child,
A. No, sir.
Q. Where were you working on the 4th day of October, 1906?
A. What is known as the new yard at Kansas City Junction, for the Frisco.
Q. The Frisco, is that the St. Louis & San Francisco Railroad Co.?
A. Yes, sir.

The COURT: What date is it he got hurt?
Mr. Kelly: Oct. 4, 1906.
Mr. TRIMBLE: I object to the evidence about his being a married man; that's got nothing to do with the case.
The COURT: The evidence is in now. Do you move to exclude it?
Mr. TRIMBLE: Yes.
The COURT: Let it be excluded, the fact that this man is married or single will cut no figure in your verdict, it's wholly immaterial.

Q. State whether or not you were injured at this new yard of the defendant Company on the 4th day of October, 1906?
A. You want me to give the full details of the whole case?
Q. State whether or not you were injured, first?
A. I was.
Q. Now explain to the jury in your own way how you were injured?
A. About eleven o'clock, between eleven and twelve o'clock in the morning, just before noon, I don't remember the exact time, we went in to pull a cut of cars out of what is known as the dead track, but it's used as a team track.
Q. First state what you were going in there for?

The COURT: He stated he was going in there for a cut of cars.

A. I had an order that Mr. Bell gave me, signed S. L. Oliver, on the 2d of October, to get two cars, two empty cars to load for Mobile,

for Cannon & Yates, Broadway Mills. I couldn't get the cars on the 2d nor on the 3d and on the 4th these two cars had been unloaded of brick on this dead track, or in other words the team track, and I went in there to get the two empty cars and to get three cars of coal, too; went to the Galloway Coal Co., and one to the Broadway Mills. After switching out the empties I throwed two cars of brick on this team track to be unloaded and in making the coupling the two cars attached to the engine and the two cars standing on this track, when I was injured the car that I got hurt on, 21,696 S. & M.

Q. What do you mean by S. & M.?

A. K. C. F. S. & M., Kansas City, Ft. Scott & Memphis; the safety appliance was gone off the drawhead.

The COURT: Was it loaded?

A. Yes, sir.

Q. That's one of the Frisco cars, the Kansas City, Ft. Scott & Memphis.

A. Yes, sir.

Q. State whether or not this was the order that was given you?

A. Yes, sir.

Q. Read it.

A. "Memphis, Tenn., October 7, 1906; C. N. Bell; please give Cannon & Yates, Broadway Mill, two empties, box cars this morning, sure, to load for Mobile. S. M. Oliver. 8:55 A. M."

Q. What was your position at that time?

A. I was helping on the crew. You mean at the time I was injured?

Q. At the time you got this order?

A. I was foreman of the crew.

Q. What were your duties then?

A. To see that the work was done and to have the work done out there at this new yard that is used to hold cars for further orders.

Q. Were you foreman on the dates you were injured?

A. I was foreman on the second and on the third. Mr. Walters was foreman on the fourth.

Q. Mr. Walters succeeded to your place?

A. Yes, sir.

Q. Then what did you go to doing?

A. I was switching, helping in the field, the second man on the engine.

Q. When did you get this order to get these two empties?

A. On the second of the month about eight o'clock.

The COURT: He's told that three times, Mr. Kelley. We can't stop to go that so many times. He has stated that three times, the 2d of October.

Q. Well, go ahead then and explain now where this car was?

A. As I said I threw two cars of brick back on the dead track, or rather the team track, that's what they were put on there for, was to be unloaded.

Q. What is it called the team track for?

A. Well, it's known as the team track because teams can go up to cars to unload right out of the cars into the wagon; that's the only track in the yard you can unload any car off of.

Q. State whether or not these other loaded cars you were moving were cars in trains or whether that was their destination or what?

A. They were.

The COURT: Were what?

A. They were in trains.

Q. Do you know what this car, this defective car that you started to couple was loaded with?

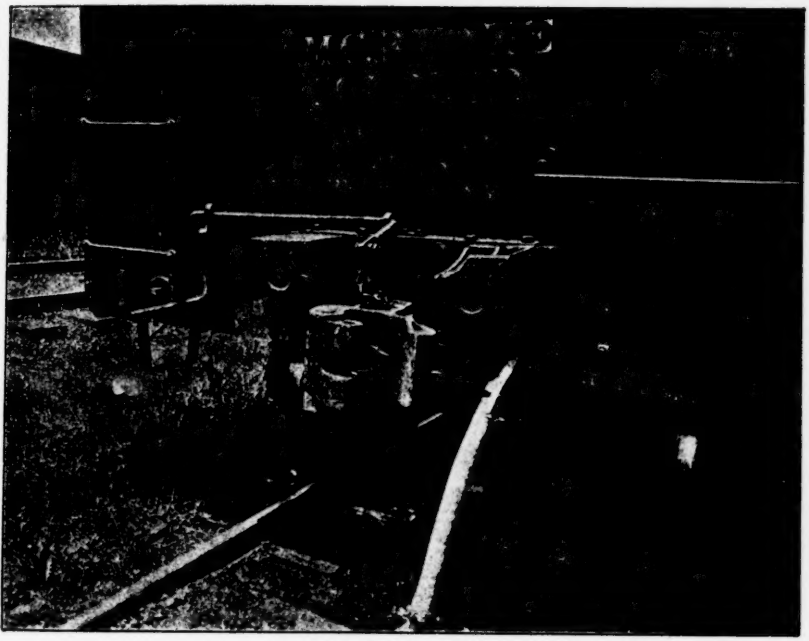
A. No, sir; I do not; I know it was loaded.

Q. Well, now explain to the jury how you were injured.

A. As I went to couple the two cars that were on the dead track with the two cars that was connected to the engine, when I started to make the coupling one of the knuckles was Gould drawhead, you lift the chain that connects the lift rod on the end of the car to the lug in the drawhead; that was broken off and gone.

Q. Mr. Delk I will hand you this picture, Marked Exhibit "A" to this Bill of Exceptions, and ask you to state if it shows the drawhead? That's not the same car, it just shows a drawhead so they can understand?

(Here follows Exhibit A, photograph.)



"Exhibit A."

A. Yes, sir; that's the drawhead, it's the same kind I was injured on.

Q. Explain to the jury what was the matter with the car?

A. The chain that connects the lift-rod with the lug——

Q. Take this picture and explain with it?

The COURT: There's nobody can see that picture unless you give each man on the jury a picture.

(The jurors left their seats and stood up around the witness while he gave his answer, referring to the picture.)

A. The chain that connects the lift-rod on the end of the picture—this is the lift rod on the end of the car, the chain that connects the lift rod right here to the lug right here inside of the drawhead was broken off and gone. This piece was gone that connects to this lug inside that you raise the lift rod up, to get the knuckle open, that was broken and gone. The plates on each side of the drawhead to hold the drawhead in its place was gone. There was about two inches of slack on each side of the drawhead where there's supposed to be no slack at all. I tried to make the coupling three times and I couldn't; the drawhead would jump over to me every time. I tried to put my fingers in there and shove this lug back but I couldn't get it to go back at all. I then put my foot on the side of the drawhead, not the end, and shoved it over with my foot and had this hand on the grab iron of one car and the other hand on the grab iron of the other car—they was about two feet and a half apart—and I gave them the signal to come up slow, but instead of coming up slow they come fast and the drawhead jumped over and my foot was caught in here, and I stayed there and held up my weight by the grab irons.

Q. State whether or not you could have made that coupling without going in there between the cars?

A. No, sir; I couldn't because the knuckle on the other draw head was a New Chicago and was stiff and would only open half way and I couldn't get this knuckle open so it was necessary to hold this drawhead over. I tried to hold it over in order to effect the coupling.

A JUROR: Is this the knuckle?

A. Yes, sir; that was closed; I couldn't open it. The plates were gone off of each side of the drawhead, allowing the drawhead to play back and forth.

A JUROR: You see here's the lever he uses?

WITNESS: Yes, sir; to raise the pin.

Q. You state you wouldn't have had to have gone between the cars if that chain had not been broken. How would you have opened it?

A. I would have walked across on the other side and pulled the lift-rod up and opened the knuckle before I started to make the coupling, like I tried to open the knuckle when there was no chain on there at all.

Q. You state these drawheads would not meet when they went together by impact?

A. No, sir; this would jump about an inch and a half and hit the other drawhead and cause it to close.

The COURT: Was this the chain that was broken?

A. Yes, sir; it was broken off down here.

Q. You state that one would jump over that drawhead? Why would it do it?

A. On account of this drawhead and the drawhead in the other end of the car is connected together with what is known as a C rod on each side of the drawhead, and when a car is loaded, when you move one drawhead it causes the other one to jump over on account, that's the reason all this lost motion was in there.

Q. Where are the plates you speak of?

A. They are between the wood and the drawhead.

Q. Were they there on this car?

A. No, sir; they were gone.

Q. The chain was broken off and the plates were gone?

A. Yes, sir.

Q. How much lost motion was there?

A. About three inches and a half or four inches all together.

Q. Is that one?

(The lug will be made an exhibit to this bill of exceptions.)

A. Yes, sir; that's a lug.

Q. Is that chain and lug there that fits into the——

A. That fits in the drawhead.

Q. This is the piece that was broken off and gone; I mean it was broken off up here?

A. Yes, sir.

Q. Could you get that up without going between the cars?

A. No, sir; I couldn't get it up after I went between the cars.

Q. Why?

A. Because I couldn't shove it back; it was hung in there some way; I tried to shove it back with my fingers.

Q. How long would it have taken to have fixed that?

A. About ten minutes.

Q. When did this car come to Memphis; did you know?

A. On the 28th day of September, 1906.

Q. Would this car, 21,696, couple automatically by impact?

A. No, sir.

Q. Why did you use your foot to push the draw-head over?

A. What is the question?

Q. Why did you use your foot to push this drawhead over?

A. Well I had tried to make the coupling three times, it would jump over each time and I thought possibly by putting my foot up and holding to the grab irons with my hand and letting them come back slow, I could effect the coupling.

Q. State whether you could get more power on it that way?

A. That's the only way I could shove it over.

Q. State whether that's customary?
A. I have seen it done thousands of times.

(Question and answer objected to by defendant.)
(Objection sustained.)
Mr. PERCY: We except to the question and answer being excluded because if it is the usual way where force is necessary in order to bring about the coupling that the switchmen use their foot instead of their hands, it is competent to show that fact on the question of his negligence in using his foot.

Q. How many lift rods was there to this car?
A. One on each end of the car.
Q. Do you know which end of the car, whether it was the A end or the B end, I mean of car 21696, that the device was gone off of?

The COURT: How can that make a particle of difference, whether it was on the B end or the A end of the car?
Mr. KELLY: I don't know that that makes much difference.
The COURT: Not a particle in the world, if it was on an end of the car that's sufficient, whether it was A or B.

Q. Well is that what caused the injury to foot here that's been detailed by the doctor?
A. I don't understand what you mean?
Q. I say is that what caused the injury to your foot there that has been detailed by the doctor to the jury? Is that the way you hurt your foot?
A. The defective draw-head, yes, sir.
Q. How do you move train in coupling cars or how does the engineer move them?
A. By signals from the switchman.
Q. You state that you tried this three times, to couple by impact?
A. Yes, sir.

The COURT: He stated that three times Mr. Kelly, there's no need repeating that; let's get along to something new.

Q. How far were these cars apart when you signaled the engineer to come back this third time?
A. About two feet and a half or three feet.
Q. Did you try to push this draw-head over with your hand?
A. Yes, sir.
Q. State whether or not it was absolutely necessary to use your foot to effect the coupling?

(Question objected to by defendant as calling for a conclusion of the witness. Objection sustained. Plaintiff excepts.)

Q. State whether or not you could have made the coupling in any other way?

(Same objection, ruling and exception.)

Q. When you can't make a coupling on account of a draw-head jumping over and it's necessary for you to go between the cars and

you can't make it with your hands, then what do you do? How do you make it?

(Question objected to by the defendant. Objection sustained. Plaintiff excepts.)

Q. Did you signal directly to the engineer?
A. No, sir.
Q. How many cars were between you and the engine?
A. Two.
Q. Who was helping you, I mean with you on the work there at that time?
A. Joe Carl, Charlie Allen, myself and Jim Walters, the foreman.
Q. Who was between you and the engineer?
A. Charlie Allen.
Q. And to whom did you give the signal?
A. Charlie Allen.
Q. What was the signal?
A. Just give him a slow signal to come back, slow, like that.
Q. The cars were about two feet and a half apart?
A. Yes, sir.
Q. State whether or not you tried to get your foot away as quick as possible?
A. I certainly did.
Q. Did the cars come back fast or did they come back slow?
A. They come back fast.
Q. In what attitude were you when they started back with respect to the coupler?
A. You mean what position was I in?
Q. Yes.
A. I had my right foot against the side of the draw-head and my hand a hold of the grab iron on one car and the other hand a hold of the grab iron on the other car.
Q. Could you have held this draw-head open with your hands?
A. No, sir, I couldn't shove it over with my hands.
Q. Now, then, you can just go ahead and state where you were carried. Another question I want to ask you; did you stay out there —how long did you stay there after you were injured?
A. Well, from the time I was injured until I got home I suppose was about a little over an hour, an hour and thirty minutes probably; after I got hurt they put me on the engine and brought me down to Mississippi Avenue and rang up for an ambulance and they came and brought me home.
Q. One other question about this car. When did this car come in? Give the history of it as you know it.

The COURT: There's no question about that I take it, that man has a record of the car here. Is there any question about that, Mr. Trimble?

Mr. TRIMBLE: It's their own evidence; I know nothing about it myself; I'm not disputing the record that's been put in here by Mr. McGregor; I suppose it's correct.

Q. State whether or not this defendant Railroad Company is en-

gaged in interstate commerce—the St. Louis & San Francisco Railroad Co.?

A. They are, they run through several states and they carry freight from one state to the other and I suppose you'd call that interstate commerce.

Q. I believe you stated the car was loaded at the time?

A. Yes, sir.

Q. How much did you earn, Mr. Delk, at your avocation?

A. When I was working the engine I made on that job $3.41 a day; when I was helping I made $2.95. I was working the engine two days previous to the day I got hurt, but since I've been hurt the Frisco has given a four per cent raise, four cents an hour.

Q. How much did you say you were earning at the time you were hurt?

A. $2.97.

Q. That's when you were switching?

A. Yes, sir, helping.

Q. Have you been able to do any work since you were injured?

A. No, sir.

Q. That was on the 4th of October?

A. 4th of October, 1906.

Q. State whether or not you suffered any pain from your foot?

A. The pain I have had I couldn't hardly stand it, I thought I was going to die two or three times.

Q. There's been two or three operations?

A. Yes, sir.

Q. Did you take an anæsthetic?

A. Dr. Burns came to dress my foot on the 4th day of October and on the 26th he lanced my foot on the top; I didn't take anything. It rose. On the 23rd of November he cut the foot open and scraped the bone. Dr. McGhee was with him and administered the general anæsthetic. On the 16th of January he cut the foot open again and scraped the bones. I was confined to my bed thirty days. It was two months and a half before I got out on crutches. My foot healed up and was well since the second operation, it felt pretty good, it didn't hurt very much, it hurt at times but was all healed up on the 2nd day of last March and he dismissed me on the 2nd day of March. He commenced treating me again on the 8th of this month and on the 11th I went to the City Hospital and wouldn't take a general anæsthetic and he cut my foot again and I didn't take anything because when I took ether or chloroform before, it's been ten days or two weeks before I could eat anything or feel right at all.

Q. State whether or not this foot still causes you pain?

A. It does.

Q. Have you got the use of your toes?

A. No, sir, I don't know whether I can walk on it at all or not, until it gets well; I have never walked on it yet.

Q. Do you know what expense you have gone to by reason of your accident in addition to your doctor's bill?

A. Well, I've been out I suppose about $25 for medicine and if I

had hired a nurse I suppose that would have cost me about a hundred dollars.

Q. Did you hire a nurse?

A. My mother is waiting on me and she will have to be paid.

(Question and answer objected to by defendant on the ground that no nurse having been employed, no recovery could be had on this account. Objection sustained.)

Q. State whether or not you worked regularly before you were injured?

A. I did.

Q. State whether or not you were sound in body and health?

A. I haven't been sick in I don't know when; I've always been healthy, worked every day.

Q. Do you know any other avocation or calling except that of railroading?

A. No, sir; I never did anything else.

Q. How old were you when you commenced railroading?

A. Sixteen.

Q. Did you go to school any?

A. Yes, sir.

Q. You have been railroading ever since you were sixteen years old?

A. Ever since I was sixteen years old.

Q. Now about this yard, Mr. Delk, where is the regular repair track, the Hospital Track, of the St. Louis & San Francisco Road?

A. They are in the main yard, on the banks of the river down here.

Q. This new yard here, is that used for making up trains, distributing them in general work?

A. Yes, sir; it's used for making up trains sometimes, but it is mostly used to hold cars out until they get billing on them to ship them out.

Q. Now, why was it necessary for you to couple that car on the team track?

A. In order to hold them up in there after we shoved them up to be unloaded, blocked them up and set the brakes; the track is down grade and you have to couple them together and set the brakes to hold them in there.

Q. State whether or not the company have a car repairer out at this yard?

A. They have got a car inspector out there.

Q. Have they got a car repairer out there?

A. I suppose he's to fix little things; I don't know.

Q. You say it would take ten minutes to fix that?

A. Yes, sir.

Q. What did you earn when you were foreman of the switch crew?

A. $3.41 a day.

Q. I believe you stated that this car was being used in interstate commerce at the time?

A. I did.

Q. I will ask you whether or not it was customary for cars to come back in accordance with your signal?
A. Yes, sir.
Q. When you signal "easy?"
A. They are supposed to come back easy.
Q. Would there have been any danger if it had come back easy?
A. If it had come back I wouldn't have got hurt.

Mr. TRIMBLE: That's an opinion; I object to it.
The COURT: What was the question?
Mr. TRIMBLE: He says, "If it had come back easy I would not have got hurt."
Mr. KELLY: He said there was no danger.
Mr. TRIMBLE: I'll let that stand; I've no objection to that.

Q. Was there any danger of pushing this over if it had come back easy?

Mr. TRIMBLE: That's a conclusion altogether.
The COURT: Yes, that wouldn't be competent.

Cross-examination by Mr. TRIMBLE:

Q. You were the foreman the day before?
A. Yes, sir.
Q. On this day you were helping?
A. Yes, sir.
Q. Who was the foreman?
A. Jim Walters.
Q. You had taken this car two or three days before yourself to that yard, had you not?
A. I don't remember whether I taken it or not; I suppose the records show if I taken it, the records show it, I don't remember.
Q. The car was marked "bad order" wasn't it?
A. No, sir; if it was I did not see it.

By Mr. PERCY:

Q. (Mr. PERCY): I want to interrupt the examination of the witness to ask him a question we omitted to ask him on direct examination, and that is, what was the car that you were trying to couple up to, this Frisco car?
A. That was system car, Frisco system.
Q. Do you know what the number and name was?
A. St. Louis & San Francisco, 32355.
Q. Both these cars belonged to the defendant company?
A. Yes, sir.

The COURT: Now, Mr. Trimble, I want to ask him a question before you begin? Mr. Delk, who was this man that you gave the signal to to move back, to signal the engineer?

A. He was a man that's supposed to follow the engine.
The COURT: Was he a switchman as you were?
A. Yes, sir.

Cross-examination, by Mr. TRIMBLE, resumed:

Here the defendant brought into the court room before the jury two iron drawheads, equipped with automatic couplers and placed them on chairs in the position they would be, when in use coupling and uncoupling and proceeded to use same in examination of the witnesses, so the court and jury could see exactly how the accident happened. These couplers are made exhibits hereto.

Q. Now, Mr. Delk, this coupler in front of you is that a Gould or a Chicago coupler?

A. That's a Chicago.

Q. Now to get it distinctly before the jury, I understand that your engine was standing on the track, coupled to two cars, was it standing north or south of you?

A. Standing west.

Q. Well, you consider the track running east and west?

A. Yes, sir.

Q. The engine was standing west of you?

A. Yes, sir.

Q. East of the engine were these two cars?

A. Yes, sir.

Q. And on the east end of the east car was this Chicago coupler?

A. No, sir; on the west end of the two cars, standing on the track was the Chicago coupler.

Q. The stationary car then had the Chicago coupler?

A. Yes, sir.

Q. And the east end of the east car had the Gould coupler?

A. Yes, sir.

Q. The Gould and Chicago coupler, when they are both in good order, will couple together by merely coming together?

A. If both knuckles are open.

Q. Does it require both to be open?

A. On a curve, yes, sir.

Q. This was on a curve?

A. Yes, sir; slightly.

Q. There was nothing the matter with the Chicago coupler?

A. Well, the Chicago knuckle was new and when they are new they work stiff, they only open about half way.

Q. Well, the Chicago coupler was partly open?

A. Yes, sir.

Q. It was a new one?

A. Yes, sir.

Q. And it was like all new ones?

A. Well, I don't know whether it's like all new ones, it was stiff; it wouldn't open all the way.

Q. Now, what part of the Gould coupler was broken?

A. The piece of chain that connects the lift rod and the lug down in the drawhead, what you get a hold of.

Q. The chain was broken that connected with this rod?

A. No, sir; that rod was broken, too.

Q. The rod was broken and the chain was broken, too?

A. Yes, sir; it was off and gone.
Q. Do you know when that was done?
A. No, sir.
Q. How far down was this rod broken?
A. I couldn't see it.
Q. You couldn't see it at all?
A. I couldn't say how far down it was broken; I couldn't reach it with my thumb and finger; I couldn't get ahold of it.
Q. In the Gould coupler with your thumb and finger you can reach clear down to the lug; put your finger in there and see if you can't reach to the lug?
A. I don't think you've got the lug down in the drawhead. (After Mr. Trimble has worked with the coupler.) That's it; now it's down.
Q. You couldn't reach the end of the rod?
A. No, sir.
Q. Did this thing come out of that coupler?
A. I don't know, sir.
Q. Where did you get that?
A. I didn't get it.
Q. So that on a straight track, even if the Gould coupler had been shut, they would have coupled together?
A. No, sir.
Q. With the Chicago coupler open?
A. No, sir; not in the condition this drawhead was in.
Q. Why not?
A. Because the plates on each side of the drawhead was gone and the drawhead had about that much play, about two inches on each side of it, and it would jump over.
Q. But if the end of the Chicago coupler had entered, it wouldn't have made any difference if it had jumped, would it?
A. Not if it could have coupled.
Q. If the end of the Chicago coupler had entered in this notch it wouldn't have made any difference if it had jumped?
A. It would have coupled.
Q. It would have coupled?
A. Sure.
Q. If it had play, it was only a question of moving it from one side to the other to have it in proper condition, if it was on a straight track?
A. What's the question?
Q. On a straight track, if the Chicago coupler had been open and this other one closed they would have coupled together?
A. No, sir.
Q. Why not?
A. Because the drawhead would jump over.
Q. On a straight track?
A. Jump over on a straight track the same as any other track, that's got nothing to do with it.
Q. If this thing had entered this place here, it wouldn't have made any difference, it would have been too late to jump, wouldn't it?

A. If it had entered, it would have coupled, I suppose.

Q. If it had play, what was to prevent you, if it had been left in the middle of this, why wouldn't it have coupled, why would it have jumped over?

A. I don't exactly know, I can't see what you are trying to get at?

Q. You say the Gould coupler had play?

A. Yes, sir.

Q. It moved two or three inches?

A. Yes, sir.

Q. Suppose it had been standing in the middle, as if there had been no play and the Chicago coupler come right up there, it would have coupled, wouldn't it?

A. I couldn't say whether it would or not.

Q. Can you see any reason why it would not?

A. If it had been on a straight track, possibly it would and possibly it would not; I couldn't say.

Q. If this coupler had been standing in the middle, why wouldn't it have coupled?

A. I couldn't say.

Q. You can't say it would not have coupled?

A. Well, I can say it would not where it was at.

Q. It wouldn't couple on that curve, but if it had been on a straight track, it would?

A. I couldn't say that it would because I couldn't get the Chicago knuckle but a little over half way open.

Q. What was the matter with the Chicago coupler; why wouldn't it come round?

A. It was new and stiff, the knuckle was.

Q. I know it was stiff, but what was the matter with it?

A. I couldn't say.

Q. What was there in it?

A. I'm not a car repairer, I can't tell you.

Q. Any way, when it came together, will you describe where the Chicago hit the Gould so as to make it jump over and which way it jumped? In the first place, you were on the north side of this track?

A. Yes, sir.

Q. And you were on the outside of the curve?

A. Yes, sir.

Q. And the Gould coupler was the one coming back?

A. Yes, sir.

Q. Now, then, did the Gould coupler jump towards your foot?

A. Yes, sir.

Q. Where did you have your foot on the Gould coupler?

A. On the drawhead.

Q. On this side?

A. No, sir; over here; right there.

Q. You had it on this side?

A. Yes, sir.

Q. You had it on the side opposite the thing that turns?

The COURT: What caught his foot if he had it there?

Q. What caught your foot?

A. This side of the drawhead caught my foot right this way.
Q. Right here?
A. Right there against the knuckle there, against that?
Q. Against this right here?
A. Yes, sir.
Q. So that you had your foot against this?
A. No, sir.
Q. Where did you have your foot?
A. Back behind a little.
Q. Here?
A. That's it, along there some place.
Q. And this partly open thing on the Chicago coupler passed this thing here?
A. No, sir.
Q. What did?
A. This drawhead jumped over and closed this knuckle. The Gould drawhead jumped over to me and closed this knuckle here, closed the Chicago knuckle; my foot was caught between the jaw and the face of the knuckle.
Q. Your foot was caught between the——
A. —jaw of the drawhead right there and the face of this knuckle.
Q. Where did you have your foot as you were standing shoving this drawhead over?
A. I had it right along there.
Q. How did your foot get between the jaw of the Gould coupler and the knuckle of the Chicago coupler?
A. When they started to back up, the drawhead jumped over about three inches, or three inches and a half.
Q. Jumped over toward you?
A. Toward me; they come with such force that the drawhead jumped over and my foot was in between before I knew anything.
Q. Your foot must then have slipped forward on the Gould coupler; is that right?
A. I don't know whether it slipped forward or which way it went; it got in there before I knew it; I know I was holding my foot against the side of the drawhead.
Q. Which way did the Gould coupler jump, from you or toward you?
A. To me.
The COURT: Did the knuckle of the Chicago coupler then couple?
A. No, sir; it closed; it jumped past the knuckle just like it did before and the two drawheads come together.
The COURT: How did your foot get in between, if it was on this side?
A. I can't say; the drawhead threw it over some way; I had nearly all my weight on that foot; I was expecting them to come back slow.
Q. And you don't know how it happened that your foot, from a position behind the jaw, got into a position in front of the jaw?
A. I can't say, only the drawhead jumped over and my foot was in there before I knew it.

Q. Was the coupler inclined to spring; was the coupling inclined to spring towards you?

A. What do you mean?

Q. You had your foot against the coupler to hold it back?

A. Yes, sir.

Q. Was it inclined to spring toward you?

A. It jumped toward me.

Q. Suppose you were standing in there; if the thing had been standing still, would it have stayed there?

A. Yes, sir.

Q. Stayed where you shoved it over?

A. No, sir.

Q. Then it was inclined to spring towards you?

A. You mean the Gould drawhead?

Q. Yes?

A. I had to take my foot to shove the drawhead over; I couldn't shove it over with my hand.

Q. You must have shoved it against a spring, then; that is, against an inclination to come toward you; isn't that right?

A. I can't see what you are trying to get at.

Q. Suppose you had taken your foot off, what would have happened?

A. The drawhead had to be held over.

Q. If you had taken your foot off then, the drawhead would have come back toward you?

A. Yes, sir.

The COURT: It came back toward you anyhow, didn't it?

A. After they backed up it did.

The COURT: I mean after the impact?

A. Yes, sir.

Q. It had jumped over in the same way precisely the three times before, that it did that time?

A. It had twice.

Q. What did it do the third time?

A. That's when I got hurt.

Q. There were only three times altogether, then?

A. Yes, sir.

Q. It had twice jumped over before?

A. Yes, sir.

Q. And you undertook to hold it with your foot?

A. And come back slow.

Q. And come back slow, and it jumped over then?

A. They come back fast and it jumped over.

Q. You say you were standing with one hand a hold of the rod on one car and one hand a hold of the rod on the other?

A. Yes, sir.

Q. How far apart were the knuckles of the two couplers at the time you had your hand in that fix and before that car started to move?

A. Two and a half or three feet.

Q. Well, the knuckles were two feet and a half or three feet apart?

A. Something like that.
Q. Your hands, then, must have been entirely extended?
A. They were out this way.
Q. Entirely out that way, as far as you could reach?
A. Yes.
The COURT: Did he have one hand a hold of the grab iron on one car and the other a hold of the grab iron on the other car?
A. Yes, sir.
The COURT: And with your feet on this knuckle, you were suspended there in the air?
A. No, sir; I hand one foot on the ground.
Q. Did you yourself give the signal? I believe you said you did not give the signal to the engineer to come back?
A. I gave it to the man following the engine. The engineer couldn't see me.
Q. You gave it to another switchman?
A. Yes, sir.
Q. Did you give it to him before you took hold?
A. Yes, sir.
Q. What kind of a signal did you give him? What did you do or say?
A. Slow signal.
Q. What did you do?
A. I gave him a slow signal, to back up slow.
Q. How did you do that?
A. With my hand.
Q. You gave him that signal and then you took hold there and put yourself in that fix?
A. I don't know what you mean by that fix.
Q. Well, in that position? I'll substitute the word "position" for fix. You gave him that signal and then put yourself in that position, with your foot against the drawhead?
A. Yes, sir.
Q. Did you know that this car had been returned from the Belt Railroad?
A. No, sir.
Q. For repairs?
A. No, sir.
Q. Did you make a statement to that effect?
A. No, sir.
Q. You say it could have been repaired in ten minutes?
A. Yes, sir.
Q. Do you know when that rod was broken on that——
A. I do not.
Q. —on that coupler?
A. I do not.
Q. The jumping over, that occurred the two times previous, was exactly the same thing that occurred that time, was it?
A. Well, I couldn't say whether it was exactly or not; I suppose so.

Q. You were moving this car on this track for the purpose of getting out some cars that had been unloaded, to take elsewhere?

A. Yes, sir.

Q. Now when you went in on the track, what did you find? How many cars were on that track?

A. Nine.

Q. How many of them had been moved? In the first place you went in with your engine from the west end and hooked on to those nine cars?

A. Exactly.

Q. What did you do then?

A. I pulled them all out.

Q. Pulled a whole lot of them out together?

A. Yes, sir.

Q. What did you do then?

A. I switched out two empties and three cars of coal.

Q. You set them on the other tracks?

A. On the lead.

Q. Were those two empties and the three cars of coal, were they at the east end of that string of cars?

A. No, sir.

Q. Where were they in this string?

A. The two empties were the two last cars.

Q. The two east cars?

A. Yes, sir.

Q. Now, then, the three cars of coal, where were they?

A. They were between two cars of brick and the two cars next to the engine.

Q. These three cars of coal, then, were standing together and had before that been coupled to this Gould coupler, one of them?

A. One of the cars of coal.

Q. Yes?

A. Yes, I suppose so; it might have come in here with the car for all I know.

Q. Then you moved out the two cars of brick and set them on one side and pulled out the three cars of coal and set them on one side and uncoupled the car that you left on the side track from the bad order Gould coupler?

A. No, sir; I didn't do it that way.

Q. How was it done. I want to see exactly. I don't mean to misstate you.

A. I throwed two cars to the lead, two cars of brick back to the team track, three cars of coal to the lead, then went back to the team track to couple up with the two cars and the engine.

Q. With the two cars of what?

A. With the two cars and the engine.

Q. You left the two cars to the engine all the time?

A. Yes, sir; I had hold of them to couple up to the other two cars with and leave them on that track.

Q. Well, I don't quite understand the movements yet?

The COURT: As I understand it he was proposing to couple the

two cars on the engine to the two on the side track and leave the four on the side track?

A. Yes, sir.

Q. But what you had done with this other Gould coupler before is what I'm getting at?

A. I never had nothing to do with it before, only I got three cars of coal a-loose from it.

Q. That's what I thought, you had set three cars out in another track and uncoupled them from this Gould coupler?

A. I did.

Q. And then you came back to the Chicago coupler which had before that been coupled to something else, too?

A. Yes, it had been coupled to something else.

Q. And in the uncoupling it had been opened at least to the extent it was, or had it been opened at all?

A. Yes, it had been opened because I opened it when I went in there to try to couple to it.

Q. Had it been opened in uncoupling from the other car?

A. I couldn't say whether it had or not. I suppose it had. I don't remember which pin I pulled when I cut a-loose from that car; whether it was the Chicago pin or the pin on the other car.

Q. It was sufficient to pull one pin to uncouple and usually sufficient to lift one lug to couple?

A. No, sir; you can cut loose with one pin but you can't couple them with one pin nine times out of ten, unless you are on a straight track.

Q. You didn't do all of this on a curve, did you?

A. Yes, sir, the yard's on a curve right there.

Q. You took this car over to the Belt, according to the record, didn't you?

A. I believe Mr. McGregor stated that I taken it to the Belt; I worked the engine on the 2nd and 3rd; I suppose I did.

Q. Do you know where this lumber company is that Mr. McGregor spoke of?

A. No, sir.

Q. You know it's on the Belt Railroad, don't you?

A. No, sir; I do not.

Q. What were you going to do with that car after you got those other two out?

A. Which car do you mean?

Q. The car with the Gould coupler on it?

A. I was going to leave it in there where it was at as soon as I coupled up and shoved up and spotted the two cars of brick.

Redirect examination, by Mr. KELLY:

Q. Do you know whether or not that car was repaired before it was coupled, after you were injured?

A. Yes, sir.

Q. It was repaired then before it was coupled?

A. Yes, sir.

Q. I asked you if the car, the defective car that injured you, after

you were injured was it repaired by the car repairer before he made the coupling where you were injured?

A. I didn't see him repair it, but I understand that it was repaired.

Q. But you don't know that?

A. I didn't see him repair it, no; I was at home in bed, but I understand he did repair it.

Q. Who was the foreman there at that time?

A. Jim Walters.

Q. Who had charge of the crew?

A. Jim Walters.

Q. And you were working under him?

A. Yes, sir.

Q. Who signed this order that you were executing?

The COURT: It shows there for itself.

Q. Now this knuckle wasn't in here awhile ago. Now, Mr. Delk, you say this was the defective car, a knuckle was closed there and you couldn't get it open?

A. No, sir; I couldn't.

Q. If you could have gotten that knuckle open, could you have made the coupling?

A. Yes, sir.

Mr. TRIMBLE: I didn't understand the question.

Mr. KELLY: I asked him if he could have got this knuckle opened, could he have made the coupling and he said he could.

Q. You couldn't get it open because this chain was broken?

A. Yes, sir.

Q. And it jumped because the plates were not on the side?

A. Yes, sir.

Q. Is that the kind of Gould coupler that was on your car? Do you remember?

A. From the face of the drawhead, the front of it, it looks about the same.

Q. Do you know whether or not this is a later pattern?

A. I don't know, I think not, I think that's the same kind of drawhead that I got hurt on.

Q. You don't know how your foot slipped off of here?

A. No, sir.

Q. But you know it slipped off and got between there with your weight on it?

A. Yes, sir; it slipped off. It slipped off with the drawhead jumping over it is what threw my foot in between,—coming back so fast.

Q. Why did the Belt Line send this car back?

A. I didn't know that they sent it back at the time.

Q. When did you find out about that?

A. When I got well three months afterwards and seen the books in the office.

Q. Do you know why the Belt Line sent it back?

A. Yes, sir; for safety appliance.

Q. The Belt Line declined to accept it?

A. Yes, sir.

Q. Because this safety appliance was off of it?
A. Yes, sir.
Q. That was on October 2d?
A. Yes, sir.
Q. And it had been there till October 4th?
A. Yes, sir.

Recross-examination.

By Mr. TRIMBLE:

Q. Do you know the date when it came back?
A. On the 3d. I found that out afterwards, in the office off of the books. I don't remember seeing the car come back on the 3d.

Mr. TRIMBLE: I object to the evidence then because it's hearsay.

The WITNESS: I seen it on the books that the car come back on the 3d.

The COURT: No, he says that he made an examination after he got back to the office and saw that it had been sent to the shop for repairs on the 3d.

Mr. TRIMBLE: As to that date, his method of information and testifying makes that plainly hearsay.

The COURT: Do you remember of your own knowledge the date you got hurt?

A. Yes, sir.

The COURT: The day you did this work?

A. Yes, sir.

The COURT: He's testifying as to why and when the car was sent for repairs, that it was on the 3d; that is not information he got from the books.

Mr. TRIMBLE: But he can not testify as to information he got from the books, that's hearsay.

The COURT: Well the objection is sustained?

Mr. PERCY: He didn't say anything about the car being sent for repairs, he said it was returned from the Belt Line. I don't think the answer was competent myself.

By Mr. KELLY:

Q. Does this picture show this curve as it was on that team track?

A. I'll have to look at the picture again.

The COURT: Well, the track is on a curve he says.

Mr. TRIMBLE: I object to the photographs as far as they go to show a curve, when they were taken looking square cross-wise of it; you can't tell how much of a curve there is; they are misleading in that respect.

The COURT: Show the decree of curve there.

Q. Do you know anything about the degree of curve that this curve, this team track, was?

A. Well, there was enough curve—I was two car lengths from the engineer and he couldn't see me.

Q. How long is a car?

A. A car, I suppose those cars were from thirty-six to forty feet; I don't know their exact length but some run as high as fifty feet.

Q. How long is the tender?

A. About twenty feet, I suppose.

Mr. KELLY: Does your Honor hold that I can't submit these pictures:

The COURT: You may if you can identify them as a proper representation of what is there.

Mr. KELLY: I want to ask him if this picture showed that team tract as it was with the exception of the cars on it on that day?

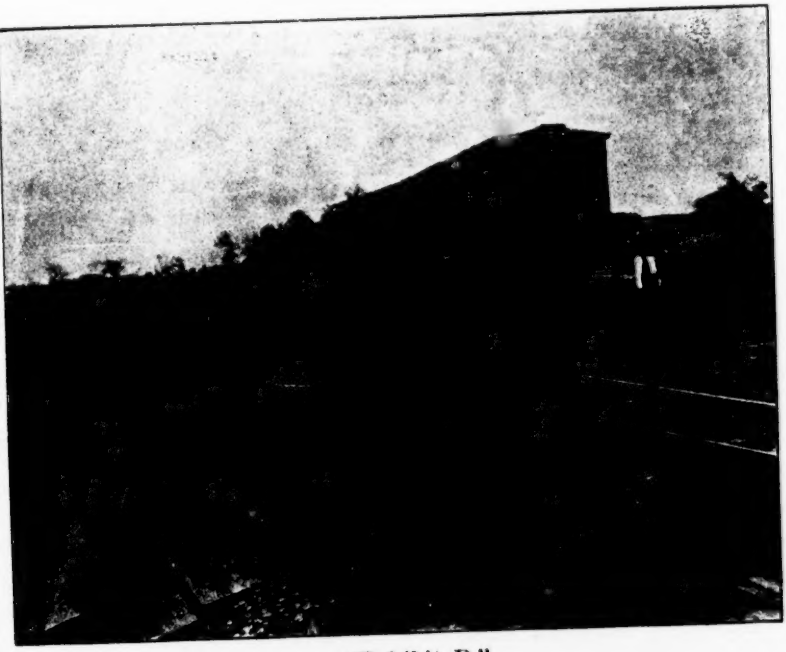
A. Well, yes; but there's a little more curve right down in front of the cars than you've got here. The pictures don't show the full length of the track out to the switch; it's about like that.

The COURT: Is there any objection to this?

Mr. TRIMBLE: I don't care to make any objection to it now:

(Picture is made exhibit to this Bill of Exceptions.)

(Here follows Exhibit B, photograph.)



"Exhibit B."

Q. What advantage was gained by opening this knuckle on the defective car?

A. If I could have got the knuckle open, I could have made the coupling; that's the only advantage.

Q. Do you know which part hit first?

The COURT: Which car hit first?

Mr. KELLY: I say which parts of the drawhead hit first, when they would run together?

A. This knuckle would hit over against the other one there, the knuckle on the Gould coupler would jump over and hit there on the face of it.

Q. You state that you had just allowed it to back up there two times before that and tried to make the coupling by impact?

A. Yes, sir.

By Mr. TRIMBLE:

Q. Did you open the Chicago coupler each time?

A. Yes, sir.

Q. And each time it closed?

A. It was knocked closed, yes.

The COURT: You just stated, as I understand, that if you got the Chicago coupler open, the coupling would have been made; now you state that you did open it twice before?

A. I couldn't open the Gould coupler at all. I never have said I could open that.

Mr. KELLY: The Chicago coupler was on the good car?

A. On the good car, it was in good order.

Here the plaintiff rested and the defendant introduced the following evidence:

Defendant's Evidence.

THOMAS B. HOLMES, a witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. TRIMBLE:

Q. What is your name?

A. Thos. B. Holmes.

Q. You are in the employ of the St. Louis & San Francisco Railroad Co., at the present time, I believe?

A. Yes, sir.

Q. What is your business?

A. Car Inspector.

Q. What was your business on the 4th day of October, 1906?

A. Car Inspector.

Q. Were you present at the time when switchman Delk was injured?

A. No, sir.

Q. What do you know about Kansas City, Ft. Scott and Memphis car with a Gould coupler on, that is alleged to have caused that injury? I think it was number 21,696.

A. It had a Gould coupler, lock handle broke.

Q. What do you know about that car, about the movements of that car?

A. I don't know anything about the movements; I know it was returned from the Union Railway on October 3d for safety appliance.

Q. Was it your business to know about that?

A. It was my business to fix that, yes, sir.

Q. What time in the day was it returned, do you remember?

A. I disremember exactly what time.

Q. Did you proceed to fix it?

A. Not that evening, I didn't have the material the evening that the car was returned. I had to send to town the next morning after the material and the man never got back until after Mr. Delk was hurt.

Q. Who went after the material?

A. H. L. Kennedy.

Q. What material did you have to have?

A. A Gould lock.

Q. What time of day did this injury happen?

A. Sometime in the day between ten and eleven o'clock, I don't know exactly what time it was.

Q. Did I understand you to state that the man was gone after the material at that time?

A. He went in the morning, yes, sir.

Q. What time did he get back?

A. He got back somewhere about that time, he walked back.

Q. What?

A. He had to walk back, he got back somewhere about that time.

Q. You had to have a Gould lock where did you have to go to get it?

A. Had to go to the shops.

Q. How far was the shops from that place?

A. I guess it's about two and a half or three miles.

Q. Now, I will ask you to state whether or not there were any marks on that car, whether it was marked "bad order," or what, anything of that kind?

A. There was a bad order card turned over and written on it with a blue pencil "bad order," hold for repairs.

Q. When was that put on there?

A. Put on there the 3d.

Q. How long did it remain there?

A. Stayed there until I repaired the car.

Q. Who put it on there?

A. I did.

Q. Mr. Holmes, was there anything else the matter with the coupler?

A. Well, I don't know as there was anything else the matter with the coupler, there seemed to be some slack in the coupler.
Q. Some slack?
A. Yes, sir.
Q. What do you mean by slack?
A. Well, it means play between the draught timbers.
Q. Play sideways?
A. Yes, sir; it was an old car.
Q. An old car?
A. Yes, sir; all of them get worn out in there between the timbers.
Q. Do you know about cars coupling, about the difficulty of coupling cars on a curve?
A. Well, I never did any switching.
Q. You never did any?
A. No, sir.
The COURT: Where is that card on the car that you speak of? What side of the car?
A. It was on the east side of the car the way it was faced, the way it was standing then.
The COURT: Where was it standing then?
A. It was on the dead track.
The COURT: It was on the side then next to the cemetery.
A. No, sir, it was on the opposite side from the cemetery.
The COURT: The car was, or the card?
A. The card.
Q. That would be the north side or east side?
A. I call it the east side there; I don't know how them tracks run, exactly.
Q. The north or east side?
A. Yes, sir.
Q. On the outside of the curve?
A. I don't know how the curve runs, I don't know whether it's the outside or inside of the curve.

Cross-examination.

By Mr. KELLY:

Q. How long did it take to fix that car after you got the material?
A. About ten minutes.
Q. Do you remember what time in the day Mr. Delk was injured?
A. No, sir; I don't exactly know the time, it was somewhere between ten and eleven o'clock, I think.
Q. On the morning of the 4th?
A. Yes, sir.
Q. Now as I understand, this team track was used to deposit cars, loaded cars in trains, and to unload cars also? Wasn't it?
A. Yes, sir; all the same thing.
Q. Where is the regular hospital track where nothing but bad order cars are left?
A. The shop.
Q. Where is that?

A. At the shop down in the yard.
Q. How far from the new yard?
A. Down in the old yard.
Q. The old yard?
A. Yes, sir; that's the new yard out there.
Q. Are trains made up out in this new yard? Do you separate trains and make trains up out there?
A. On McLemore, one and two, yes sir.
Q. It's used in general business out there, is it?
A. Yes, sir.
—. This team track, loaded cars were on it at that time and had been on it all the while, hadn't they?
A. I guess so.
Q. Constantly in use, that is you had to go in there and take cars off and put them back all the while?
A. Yes, sir.
Q. Do they have to couple up cars on that track when they leave them?
A. Have to couple them up or block them up.
Q. This track is on a curve, isn't it?
A. Yes, sir; a sort of a curve, I don't know how much.
Q. How big was this card that you put on there?
A. About three by six.
Q. What colored piece of paper was it?
A. Red.
Q. A piece of red paper?
A. Yes, sir; wrote with a blue pencil.
Q. "Out of order?"
A. Yes, sir.
Q. That was done when it was sent back on the 3d?
A. Yes, sir.
Q. How long did it stay in the yard before it was sent back by the Belt, before it was sent to the belt, how long did it stay in your yard?
A. The first time you mean?
Q. Yes, sir.
A. I don't know sir, I don't see the cars until they are returned.
Q. Do you know when this device was broken off of car No. 21,696?
A. No, sir; I do not.
Q. You state that there was considerable slack in there; what do you mean by that, in 21,696?
A. Well, the draught timbers, there's two draugh- timbers that the coupler works between; well the coupler works up there and that gets worn out, the timbers gets worn and it will play either way?
Q. How much did this 21,696 play backwards and forwards? As much as three inches?
A. I couldn't say.
Q. Are there some plates that fit in there?
A. Supposed to be, chafing irons.
Q. Do you know whether they were on that car or not?

A. I do not.

Q. But you do know it was old and worn and there was some play in there?

A. There was considerable play in there.

Q. It was old and worn?

A. An old car.

Q. You say the block was broken?

A. Yes, sir.

Q. This business here was broken, down in there?

A. Yes, sir.

Q. Did you examine the knuckle on the good order car, the Chicago knuckle, as to whether or not it was stiff?

A. No, sir; I did not; I didn't see anything wrong with it.

Q. Did you examine it as to whether or not it was stiff?

A. No, sir.

Q. I believe you say you repaired this car before the car was coupled, after Delk was injured?

A. Yes, sir; I repaired the car.

Q. Why did you repair it before you made the coupling?

A. Why I couldn't couple it, myself.

Q. You couldn't couple it?

A. No, sir; I couldn't handle it. I had to leave it open.

Q. Why?

A. I couldn't handle the car.

Q. Couldn't handle it until you fixed it, and you fixed it in order to couple it?

A. I fixed it so it would go back to the Belt Line. Whether it was ever coupled or not after he got hurt, I don't know. They left it open for me to fix it and I fixed it.

Q. Was it coupled to another car after you fixed it?

A. Oh yes, coupled to another car and carried away from there.

Redirect examination.

By Mr. TRIMBLE:

Q. Did you say the Gould coupling was open when you came to it?

A. No, sir; I did not.

Q. You said they left it open for you to fix it?

A. I said they left the cars apart.

Q. Now about the breaking of this chain or rod; exactly what was broken in it? Do you remember?

A. Yes, sir, exactly what was broken.

Q. Show the jury?

A. It was broken off right here (illustrating).

Q. The pin was broken off short down?

A. Yes, sir.

Q. Do you know whether it was an old or new break?

A. No, sir.

Q. Explain to the jury what causes those things to break and whether the breaking is frequent or not?

A. Well, they break a whole lot, yes sir, you see this coupling goes back there and fits up right here; if there is too much slack

here it will shove this back. Suppose this chain stays up on top of the dead wood, it will snatch this off right here nine times out of ten.

Q. How many cars do you have to repair of that kind? It's your business to keep these couplers in repair, is it?

A. Yes, sir.

Q. How many do you have to repair?

A. Oh a good deal when business is good, nine or ten a day sometimes, maybe more than that.

Q. And the breaking is from the cause you named?

A. It is caused from too much slack or from lumber extending over and hitting it, extending over from another car and hitting it.

Q. It arises from various causes?

A. Yes, sir.

Q. Such breakages are quite common?

A. Yes, sir.

Q. You work at the yard all the time?

A. Yes, sir.

Q. You were working there then, at that time?

A. Yes, sir.

Q. What were your other duties, if any, besides watching these couplers?

A. Car inspector, interchange car inspector.

Q. Did you inspect this car when it went over to the Belt?

A. The first time before it was returned?

Q. Yes, sir.

A. No, sir; they bring the cars out to the yards and switch them out and carry them right on to the Belt Line or wherever they go and I never see that car unless it's returned to me and when it's returned I either send it to town or fix it myself.

Q. A repair like this, you always did it out there?

A. Always fixed it out there?

Q. How many different kinds of couplers are there—of the couplers?

A. There's only two Gould couplers, this and an old style Gould.

Q. How many different automatic couplers are there?

A. I don't know sir how many there is, a whole lot of them.

Q. And whenever one breaks, you have to have a thing for that particular coupler?

A. Got to have the lock that belongs to it, or can't work it, they are all different.

Q. Can you give an estimate of the number of different kind- of couplers that you handled?

The COURT: What's the purpose of that testimony?

Mr. TRIMBLE: I just wanted to show that it was entirely reasonable that he didn't have the material on hand to fix it and had to send back to the shop to get it.

Mr. KELLY: I don't think that would show it.

The COURT: I don't either.

Recross-examination.

By Mr. KELLY:

Q. They repaired these cars at the old yard too didn't they?

The COURT: We've been over that Mr. Kelly, time and time again.

Mr. KELLY: I understood Mr. Trimble to say this kind of work was all done there; this car that this lock was broken off of, it was broken down in the hole there, wasn't it?

A. Yes, sir; broke down inside the coupler.

Q. Could the knuckle on that car have been gotten open without a person going between the cars—the knuckle of 21,696?

A. No, sir.

Q. Could that have been coupled without a person going in between the cars?

A. No, sir.

J. L. WALTERS, a witness for the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. TRIMBLE:

Q. Your name is?

A. J. L. Walters.

Q. And what is your occupation?

A. Why engine foreman.

Q. Were you present at the time Mr. Delk got his foot hurt on the 4th of October last, out here at what is called the new yards of the St. Louis & San Francisco Railroad Co.?

A. I was.

Q. Did you see that accident?

A. Yes, sir.

Q. Where were you standing?

A. I suppose about five feet from him.

Q. Just described to the jury what happened?

A. Well he was trying to make a coupling between two cars there and it was on a curve and missed the coupling the first time and slacked off and opened the knuckle and tried it the second time, and he give the signal to the man ahead to give a signal to the engineer to back up and he taken his foot to shove the drawhead over and as he went to shove the drawhead over the cars come together and pinched his foot, caught his foot in there. As soon as I saw his foot was caught I give the engineer a signal to slacken off of it, slack ahead off of it. (The witness put his foot against the couplers, then in the Court Room, and illustrated as he stated above.)

Q. State whether the car with the coupling in bad order had any card on it?

A. Yes, sir; the F. S. & M. car had a card on it, "Hold for repairs."

Q. "Bad Order"?

A. Yes, sir.

Q. Were you foreman at that time?
A. Yes, sir.
Q. Did you direct this man, had you directed this man to go in and make that coupling?
A. Yes, sir; I didn't make that coupling.
The COURT: But you directed him to do it.
A. Yes, we was trying to pick that car up.
Q. The two of you were trying to pick that car up you say?
A. Yes, sir.
Q. Didn't you have it a hold of the engine at that time? Wasn't the engine a hold of it at that time?
A. I don't remember whether the cars was behind it or whether the engine had a hold of the car coupling on to the S. F. car or not; I don't remember just now.
The COURT: Do I understand you to say that you saw this card upon this crippled car and afterwards that you directed this man to go in and make this coupling?
A. Yes, sir; the card was on it "Bad Order, hold."
Q. Mr. Walters, was that track straight or on a curve?
A. On a curve.
Q. I will ask you to state in coupling cars with the automatic couplers that are in use, whether that makes any difference in the coupling?
A. Yes, sir, in some cases it does, even good couplings, we have some trouble on curves.
Q. What happens on the curve?
A. Sometimes the drawheads pass one another.
Q. How much of a curve was that? Can you describe or give the jury any idea how much of a curve it is, whether it was much of a curve or a slight one?
A. I couldn't say just how much, but there's a pretty good curve in that track.
Q. What did you say, if anything, to Delk about making the coupling, the manner of making it?
A. I don't remember. I don't remember any conversation at all that passed between any of us at that time?
Q. He just went in there to make it?
A. Yes, sir.
Q. And you stood there looking at him?
A. Yes, sir.

(Cross-examination waived.)

This was all the evidence introduced, whereupon counsel for defendant moved the court to give a peremptory instruction to the jury to find a verdict in favor of the defendant.

The COURT: I will just let you argue that in your general presentation of the case. I can act on it just as well at the close of the argument as I can now.

You may proceed with your argument on the law and facts and I will pass on the motion at the conclusion of the argument.

The case was then argued by Mr. Kelly, attorney for the plaintiff,

and Mr. Trimble, attorney for the defendant, and the argument was concluded by Mr. Percy, attorney for the plaintiff.

During Mr. Percy's argument, the following occurred; Mr. Percy said: I have here a decision by Judge Campbell of the Supreme Court of Mississippi where the facts are similar to these.

"The plaintiff in this case (referring to an opinion of the Supreme Court of Mississippi he had begun to read) was very badly hurt, and it was urged in the Supreme Court that the verdict was excessive, that the amount was unusual and unreasonable and that the court ought to remit it—that in the practice I believe in this court, if a large verdict is given—the court ought either to remit it or grant a new trial.

Mr. TRIMPLE: I submit that your Honor will give the Jury all the law they require on that subject, and I object to Mr. Percy reading any law books to the jury.

Mr. PERCY: I am reading them to the court also.

The COURT: It isn't proper to read facts to the jury.

Mr. PERCY: I am not going to read any facts. In considering the reasonableness of this verdict, Judge Campbell in this opinion said: "We apprehend that but few, if any, persons would submit to the injuries sustained by appellee for that sum." In other words, consider how you might be affected yourself——

Mr. TRIMBLE: I object to that as an improper measure of damages.

The COURT: Of course the Court will tell the jury that is not the measure of damages. If counsel desires to make that kind of statement, the jury will hear it and then the court will tell them what the law is as he understands it.

Mr. PERCY: I called attention to these decisions as being of weight, but in view of what the Court has said, and in view of the objection of my exceedingly technical friend, lest some error may creep into this record by reason of his objection, I withdraw the remark, Gentlemen of the Jury and request you all not to consider it."

Mr. Percy also said:

"Mr. PERCY: I believe that the proper charge for the court to give in this case is to charge the jury to find for the plaintiff and assess his damages, as I have already stated, but what I am going to ask the court to charge is to tell the jury that under all the circumstances of this case they shall decide whether or not the manner in which that young man undertook to make that coupling was such contributory negligence as would bar him.

The COURT: I think that's a sound proposition.

Mr. PERCY: However, I will say to your Honor, that you will find out, in my humble judgment, that the Supreme Court of the United States will go further than I am asking your Honor to go, or than you will go in this case. However, I am content on behalf of the plaintiff, to leave the case with the jury as to whether his act was such contributory negligence as would bar a recovery.

The COURT: You needn't argue that; I shall submit the case to the jury.

Mr. PERCY: Now I want to discuss, just one moment, the Johnson case, with reference to what it was intended to meet. If your Honor please, the proof in this case is that this man tried to make a coupling to hold this defective piece of machinery in place with his foot. He said that that had been done a thousand times. Now it was to prevent just such things as that, that this safety appliance act was passed. 'I have here the first case that reached the Supreme Court of the United States in which this Act was construed, the case of Johnson *vs.* Southern Pacific Co. It was decided in 1904. The act was passed in 1893, and the carriers got extension after extension of time, and so it was that no case for final decision ever came to the Supreme Court of the United States until the Johnson case got there, and in the Johnson case it was insisted that he was not entitled to recover because he got hurt in a dining car and the dining car only ran part of the way through a state and then hooked on to another train and ran part of the way on that, and therefore it was not engaged in interstate commerce and he couldn't recover. What did the Court say about it? The Court said in discussing the case, that they must look to the whole scope of the act; that they must look to the humanitarian purpose embodied in the act. The Court said "President Harrison in his annual message 1888, 1889, 1890, 1891 and 1892 earnestly urged upon congress the necessity of legislation to obviate and reduce the loss of life and the injury due to prevailing methods of coupling and braking Continues to read from the decision.)

(Defendant objects.)

The COURT: I understood counsel was addressing the Court.

Mr. TRIMBLE: Your Honor has already ruled that you would submit this case to the jury; there's no other question before the Court except what the jury will decide; this has nothing to do with anything that's to go to the jury and I object to it.

The COURT: Counsel will keep himself within the rules.

Mr. PERCY: I think it perfectly competent; I hate to be trimmed down.

The COURT: If you are addressing it to the Court, the Court will hear you, if it pertains to the subject.

Mr. PERCY: If your Honor says it isn't pertinent to this case, I will stop.

The COURT: It is pertinent to the policy of the law; everybody concedes the policy of the law to be proper; I shall sustain the exception.

Mr. PERCY: Well, this is some mighty good law and awful good facts, coming from a very sound opinion.

The COURT: Yes, I agree to all that; the point he makes is that it has no application to this case at this time."

At the conclusion of the argument, the Court said, "At the close of all the testimony in this case, counsel for defendant moved the Court to direct the jury to return a verdict in favor of the defendant in this case. After considering the matter I have concluded to sub-

mit the case to the jury and counsel can reserve an exception to the action of the Court."

To this ruling of the Court, defendant at the time excepted.

The Court then charged the jury, orally, as follows:

Charge of the Court.

GENTLEMEN OF THE JURY: E. M. Delk sues the St. Louis & San Francisco Railroad Company for Ten Thousand Dollars as damages and alleged that he was injured while he was in their employ as a switchman or brakeman, here in the City of Memphis, and that the injury was caused by reason of the company's failure to comply with what is known to lawyers as the Safety Appliance Act, and he alleges that they had not complied with that law in that they had a car being used in interstate commerce that was not equipped with the couplers as required by the law and that they are liable to him therefor in the sum of Ten Thousand Dollars. The defendant pleads and says, first, it is not guilty, that's the general issue, not liable, not guilty of the matters and things alleged in the declaration and then the defendant further pleads and says that the party was injured by reason of his own negligence, that his negligence contributed to the injury and he therefore has no right to recover anything.

Now the Act of Congress under which the plaintiff seeks to recover in this case and on which he founds his cause of action is known, as I said before, as the Safety Appliance Act, and that law provides that on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier, that means any railroad engaged in interstate commerce, to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of going between the ends of the cars. That act also provides that any employee of any common carrier who may be injured by any locomotive, car or train, in use contrary to the provisions of this Act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge.

In this case there is no question raised, so far as I have heard, as to the fact that this defendant company is a railroad engaged in interstate commerce, hauling interstate traffic. There is a question made as to whether or not this car that had the alleged crippled coupler was a car being used in hauling interstate commerce within the meaning of this act. I think from the proof, gentlemen of the jury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case. Now the fact that this man went between the cars to couple them, although he knew that the coupler was broken, would not of itself prevent him from recovering in this case, if he was hurt while

in there attempting to couple the cars, but I submit to you the proposition whether or not the manner, in which he attempted to couple the cars, was of itself negligence on his part and whether that negligence was the proximate cause of his injury.

You have heard all the facts and circumstances detailed here by the witnesses, just how he did that, and you will look to all those facts and circumstances, in determining whether or not he was guilty of negligence or whether or not the manner in which he attempted to couple that car the last time was contributory negligence. And in determining that question you will look to all the facts and circumstances, as I have said, and that includes the facts, if they be facts, that he was there, that he knew that the car coupler was broken, was not according to the law, that he is a man who was experienced in the business in which he was engaged, that his immediate superior was there and had directed him to go in and couple the cars, if he did that, that he had gone in and made two efforts to couple the cars and had failed, he then put his foot upon this drawhead and attempted to hold it in place, so that when the cars came back he could hold it in place and they would couple and in doing so he braced himself on either side with each hand on the grab irons of the cars and with one foot on the ground; now it is for you to say, from all the facts and circumstances, those I have specifically referred to as well as all the others, whether the man, who was engaged in the business and had the experience he has had in that business and under the circumstances detailed here by the witnesses, attempted to make that coupling as a reasonably prudent man should have done under the circumstances or under like circumstances.

If you conclude that he did that as a reasonably prudent man, with his experience and his observation and the facts and circumstances in the case as I have detailed or undertook to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct, in the manner in which he attempted to couple that car, was such that a reasonably prudent man situated as he was under all the facts and circumstances that surrounded him there, would not have attempted to do it and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence, and that negligence, if you believe it was the proximate cause of the injury, would be such as to bar him in this action, and that question I leave to you entirely without intimating any opinion about it.

If from anything that has been said during the charge of the court or anything in the progress of the trial, you may have fancied that you understood that the court believed this or believed that touching the question of negligence, should not be considered by you at all, but independently of anything the court has said in regard to the facts, you make up your own minds from all the proof in the case as to what you think about it each man for himself, and all together.

Now if you decide that this party was guilty of such contributory negligence as would bar his action here under the law as I have

stated, you need go no further; just state that you find in favor of the defendant.

If you decide, however, that he was not guilty of negligence, that the manner in which he coupled these cars was not negligent, and that he is entitled to recover, then your next inquiry is, "What amount is he entitled to recover?" There can be no fixed rule laid down for you to be guided by. You will look to see what the proof shows the expenses that he has incurred by reason of this accident, the doctors' bills, his medicine bills and other expenses that the proof may show that he has incurred. He would be entitled to recover that.

You will also look and determine for yourselves the extent of his injury, what effect it had upon his ability to follow up his employment, his labors, his occupation; how long if at all has it deprived him from working; how is it likely to affect, from the proof here, his future ability to work and earn money; what pain and suffering in body and mind did it cause him; what suffering and pain may reasonably concluded will follow in after life, growing out of and incident to this injury. And when you have considered all these elements of damage, why you then determine for yourselves what in your judgment, under all the facts and circumstances would reasonably compensate him, and when you determine that, why then you will return a verdict embracing the actual damages, which are expenses and such other damages as you will allow the plaintiff. And in determining the facts in the case, you may look to the testimony of each witness, his manner upon the witness stand, his manner of testifying, his opportunity to know the facts about which he testified, the reasonableness of his story, the relation he sustains to the case, if any, whether or not he might be influenced in his testimony by your verdict one way or the other and what effect that might have upon his statements, and then give each witness such weight as you think his testimony is entitled to. You should not permit any prejudice or passion that you may entertain to interfere or to influence your consideration of this case, one way or the other. Try this case as between man and man. The fact that one party is a laboring man, a poor man, on the one side, and that the other is a great corporation, should not affect your verdict one way or the other.

Now is there anything further, Mr. Percy?

(Mr. Percy hands the court some special instructions.)

The COURT: Have you anything, Mr. Trimble?

Mr. TRIMBLE: In the first place, we except to the ruling of your honor in declining to direct a verdict for the defendant and that exception will be founded distinctly upon the ground that the proof shows as a matter of law contributory negligence on the part of the plaintiff and also that the statute which your honor read to the jury, Sections 2 and 8 of the Safety Appliance Act, did not apply. We except to that part of your honor's charge which instructs the jury that under this evidence the law does apply, under the facts it does apply; your honor expressly said that to them and we except to that; and your honor stated to the jury, as I understood it, that before the

negligence of the plaintiff will operate as a bar, it must be found by the jury to be the proximate cause of the injury.

The COURT: No; that's not the statement I intended to make; I withdraw the proximate cause. I was going to another idea; what I said to the jury was, or what I intended to say and will say now, that if you believe from all the testimony in the case that this accident was caused by the negligent conduct of the (plaintiff) in the manner in which he attempted to make that coupling, that would bar him from recovering.

Mr. TRIMBLE: Now, if your honor please, I except to the instruction in that form for the reason, and call it to your honor's attention, that if the defendant was guilty of either negligence or a violation of the statute in failing to have the coupler in good condition, and the plaintiff was also guilty of a want of ordinary care in the manner in which he undertook to make the coupling, that that would be sufficient to bar.

The COURT: Take your exception.

Mr. TRIMBLE: I believe that's all.

The COURT: That raises your questions.

Mr. PERCY: In behalf of the plaintiff, we except to the action of the court in not giving the first instruction asked by the plaintiff. We except to the action of the court in not giving the second instruction asked by the plaintiff; and we except to the action of the court in not giving the third instruction asked by the plaintiff.

Mr. TRIMBLE: Now, I will ask your honor to charge the jury that if they find that the defendant was negligent and the plaintiff was also guilty of a want of ordinary care in the manner in which he made the coupling that their verdict must be for the defendant.

The COURT: I think the charge covers that question.

Mr. PERCY: I am willing, perfectly willing, for the court to charge it just like he asked it.

The COURT: If I haven't already done so, I do charge the jury now in the exact words that counsel requests I thought my charge had already covered the question.

The jury returned into court with a verdict for the plaintiff and assessed the damages at seven thousand five hundred dollars.

Thereafter the defendant filed a motion for a new trial in the words and figures following:

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

Motion For a New Trial.

Filed July 3, 1907. Dan F. Elliotte, Clerk.

Comes the defendant, the St. Louis & San Francisco Railroad Company, and moves the court to grant a new trial of this case and for grounds of such motion says:

1st. The court erred in refusing to direct a verdict for the defendant for the reason:

(*a*) That plaintiff was guilty of contributory negligence as matter of law, sufficient to bar.

(*b*) That at the time of the accident, it is undisputed that the car was marked "in bad order" and was being held for repairs, and that the statute of the United States known as the Safety Appliance Act, does not apply.

2nd. That a new trial should be granted for misconduct of counsel for the plaintiff in arguing the case to the jury, the language of counsel for the plaintiff, objection of counsel for defendant and ruling of the court thereon, being as follows:

"The plaintiff in this case (referring to an opinion of the supreme court of Mississippi he had begun to read) was very badly hurt, and it was urged in the supreme court that the verdict was excessive, that the amount was unusual and unreasonable and that the court ought either to remit it—that is the practice I believe in this court if a large verdict is given—the court ought either to remit it or grant a new trial.

MR. TRIMBLE: I submit that your honor will give the jury all the law they require on that subject and I object to Mr. Percy reading any law books to the jury.

MR. PERCY: I am reading them to the court, also.

THE COURT: Is it proper to read facts to the jury?

MR. PERCY: I am not going to read any facts. In considering the reasonableness of this verdict, Judge Cambell in this opinion said: "We apprehend that but few if any persons would submit to the injuries sustained by the appellee for that sum." In other words, consider how you might be affected yourself——

MR. TRIMBLE: I object to that as an improper measure of damages.

THE COURT: Of course the court will tell the jury that is not the measure of damages. If counsel desires to make that kind of statement, the jury will hear it and then the court will tell them what the law is as he understands it.

Mr. PERCY: I call attention to these decisions as being of weight, but in view of what the court has said and in view of the objection of my exceedingly technical friend, least some error might creep into the record by reason of his objection, I withdraw the remark, gentlemen of the jury, and request you all not to consider it."

I have here the first case that reached the Supreme Court of the United States in which this act was construed, the case of Johnson *v.* the Southern Pacific Co. It was decided in 1904. The act was passed in 1893, and carriers got extension after extension of time, and so it was that no case for final decision ever came to the Supreme Court of the United States until the Johnson case got there, and in the Johnson case it was insisted that he was not entitled to recover because he got hurt in a dining car and the dining car only ran part of the way through a state and then hooked on to another train and ran part of the way on that, and that therefore, it was not engaged in interstate commerce and he couldn't recover. What did the court say about it? The court said in discussing the case, that they must look to the whole scope of the act, that they must look to the humanitarian purpose embodied in the act. The court says: 'President Harrison in his annual message- of 1888, 1889, 1890, 1891 and 1892 earnestly urged upon congress the necessity of legislation to obviate and reduce the loss of life and the injury due to prevailing methods of coupling and braking. (Continues to read from the decision).

(Defendant objects.)

The COURT: I understood counsel was addressing the court.

Mr. TRIMBLE: Your honor has already ruled that you would submit the case to the jury, there's no other question before the court except what the jury will decide; this has nothing to do with anything that's to go to the jury and I object to it.

The COURT: Counsel will keep himself within the rules.

Mr. PERCY: I think it perfectly competent; I hate to be trimmed down.

The COURT: If you are addressing it to the court, the court will hear you, if it pertains to the subject.

Mr. PERCY: If your honor says it isn't pertinent to this case I will stop.

The COURT: It is pertinent to the policy of the law; everybody concedes the policy of the law to be proper. I shall sustain the exception.

Mr. PERCY: Well, this is some mighty good law and awful good facts, coming from a very sound opinion.

The COURT: Yes, I agree to all that; the point he makes is that it has no application to this case at this time."

3rd. Because the court erred in the charge given the jury, excepted to at the time in the following particulars:

(*a*) "Now the act of congress under which the plaintiff seeks to recover in this case and on which he founds his cause of action is known, as I said before, as the Safety Appliance Act and that law provides that on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier, that means any railroad en-

ged in interstate commerce, to haul or permit to be hauled or ed on its line any car used in moving interstate traffic not equipped ith couplers coupling automatically by impact and which can be ncoupled without the necessity of going between the ends of the rs. That act also provides that any employee of any common rrier who may be injured by any locomotive, car or train, in use ntrary to the provisions of this act, shall not be deemed thereby to ave assumed the risk thereby occasioned, although continuing in e employment of such carrier after the unlawful use of such lomotive, car or train had been brought to his knowledge.

In this case there is no question, so far as I have heard raised, as the fact that this defendant company is a railroad engaged in interstate commerce, hauling interstate traffic. There is a question nade as to whether or not this car that had the alleged crippled oupler was a car being used in hauling interstate commerce within he meaning of this act. I think from the proof, gentlemen of the ury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident, and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case."

(*b*) "Now, if you conclude that he did that as a reasonable, prudent man with his experience and his observation and the facts and circumstances in the case as I have detailed or undertook to state them here, then if you feel that that was done as a reasonable and prudent man would have done it, he would not be barred in this action; but if you believe that his conduct in the manner in which he attempted to couple that car, was such as a reasonably prudent man situated as he was under all the facts and circumstances that surrounded him there would not have attempted to do it and that it was a negligent was to attempt to do it and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence, and that negligence, if you believe it was the proximate cause of the injury, would be such as to bar him in this action, and that question I leave to you entirely without intimating any opinion about it."

(*c*) On exception taken by the defendant to the above, the court stated as follows:

The COURT: "No, that's not the statement I intended to make; I withdrew the proximate cause; I was going to another idea; what I said to the jury was, or what I intended to say and will say now, that if you believe from all of the testimony in the case that this accident was caused by the negligent conduct of the plaintiff in the manner in which he attempted to make that coupling, that would bar him from recovering."

4th. The damages allowed by the jury are excessive.

C. H. TRIMBLE, *Attorney.*

This motion coming on to be heard, the court granted the same unless the plaintiff would remit the sum of two thousand five hundred dollars. In doing so the court said:

The plaintiff thereupon remitted the sum of two thousand five hundred dollars and judgment was entered for five thousand dollars.

To the action of the court in refusing to grant a new trial the defendant at the time excepted.

That the foregoing may appear of record this bill of exceptions is signed by the court, ordered filed and made a part of the record this 12th day of August, 1907.

JNO. E. McCALL,
Judge, Etc.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886. Law.

E. M. DELK, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO., Defendant.

Petition for Writ of Error.

Filed August 21st, 1907. Dan F. Elliotte, Clerk.

Now comes the St. Louis & San Francisco Railroad Company, defendant herein, and says that at the May term, 1907, this court entered a judgment herein, in favor of the plaintiff and against the defendant, in which judgment and proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will, more or less in detail, appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the 6th Circuit, for the correction of errors so complained of and that a transcript of the record and the proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

C. H. TRIMBLE,
Attorney for Defendant.

Writ of error allowed as prayed, this 23rd day of August, 1907.
JNO. E. McCALL, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D., 1907, at the United States court house in the city of Memphis, in said district on to-wit the 22nd day of August, A. D., 1907, in the following cause, to-wit:

No. 3886. Law.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO R. R. Co.

Order Granting Writ of Error and Supersedeas.

On this day came the defendant the St. Louis & San Francisco Railroad Company, by its attorney, and files herein and presents to the court its petition, praying for the allowance of a writ of error intended to be urged by it, and praying also that transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Sixth Circuit, and that such writ of error may operate as a supersedeas and that such other and further proceedings may be had in this cause as are proper in the premises.

And it appearing to the court that its bill of exceptions and assignment of errors have been filed and made a part of the record herein, and that the defendant's prayer for a writ of error is in due time and in conformity with the rules of the court and the statutes in such cases made and provided; thereupon upon consideration thereof, it is ordered by the court that the prayer of the petition for a writ of error be allowed upon the defendant executing a bond, to be approved by the court, in the penal sum of six thousand ($6,000.00) dollars and which shall operate as a supersedeas bond.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 3886.

E. M. DELK
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD CO.

Supersedeas Bond.

Filed August 22nd, 1907. Dan F. Elliotte, Clerk.

Know all men by these presents, That we, the St. Louis & San Francisco Railroad Company, as principal and American Surety Company of New York as sureties, are held and firmly bound unto said E. M. Delk in the full and just sum of six thousand ($6,000.00) dollars, lawful money of the United States of America, to be paid to the said E. M. Delk for the payment of which well and truly to be made, we hereby bind ourselves jointly and severally and our joint and several heirs, executors and administrators by these presents.

Signed by us, sealed with our seals and dated at Memphis, Tennessee, this 21st day of August, A. D., 1907.

Whereas the above named principal has prosecuted a writ of error to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, holden at Cincinnati in the State of Ohio, to reverse the judgment rendered in the above entitled suit against said principal by the Circuit Court of the United States for the Western Division of the Western District of Tennessee. Now, therefore, the condition of the foregoing obligation is such that if the above named principal shall prosecute its said writ of error to effect and answer all costs and damages if it fail to make its plea and the said writ of error good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By C. H. TRIMBLE, *Attorney.*
AMERICAN SURETY COMPANY OF NEW YORK,
By FRED'K FOWLER,
Resident Vice Pres't.
By S. J. SHEPHERD,
[SEAL.] *Resident Ass't Sec'y.*

Signed, sealed, delivered, taken and acknowledged before me at Memphis, Tennessee, this 22nd day of August, A. D., 1907.

DAN F. ELLIOTTE,
Clerk of said U. S. Circuit Court,
By E. J. HEIDEL,
Deputy Clerk.

Approved:
JNO. E. McCALL,
U. S. District Judge.

In the United States Circuit Court of Appeals for the 6th Circuit.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Plaintiff in Error.
vs.
E. M. DELK, Defendant in Error.

Assignment of Errors.

Filed August 21st, 1907. Dan F. Elliotte, Clerk.

Afterwards, to-wit: on the 20th day of August, in the year of our Lord, one thousand nine hundred and seven, at the October term of the Circuit Court of Appeals of the United States for the 6th Circuit, comes the plaintiff in error, the St. Louis & San Francisco Railroad Company, by C. H. Trimble, its attorney, and says that in the record and proceedings in the above entitled matter, there is manifest error in this, to-wit:

1st. The court erred in refusing to direct a verdict for the defendant, for the reason:

(*a*) That the plaintiff was guilty of contributory negligence as a matter of law, sufficient to bar.

(b) That at the time of the accident, it is undisputed that the car was marked "in bad order" and was being held for repairs and that the statutes of the United States known as the Safety Appliance Act, as amended, being entitled "An Act to promote the safety of employees and travelers upon railroads, by compelling common carriers engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes, approved March 2, 1893, and an Act to amend the same, approved April 1, 1896," and all other statutory laws upon that subject do not apply.

2nd. Because of errors or law in the misconduct of counsel for the plaintiff in arguing the case to the jury; the language of counsel for the plaintiff, the objection of counsel for defendant and the rulings of the court thereon, being in words and figures following:

"The plaintiff in this case (referring to an opinion of the supreme court of Mississippi, he had begun to read) was very badly hurt, and it was urged in the supreme court that the verdict was excessive, that the amount was unusual and unreasonable and that the court ought to remit it—that is the practice I believe in this court if a large verdict is given—the court ought either to remit it or grant a new trial.

Mr. TRIMBLE: I submit that your honor will give the jury all the law they require on that subject and I object to Mr. Percy reading any law books to the jury.

Mr. PERCY: I am reading them to the court also.

The COURT: Is it proper to read facts to the jury?

Mr. PERCY: I am not going to read any facts. In considering the reasonableness of this verdict, Judge Campbell in this opinion said: 'We apprehend that but few, if any persons would submit to

the injuries sustained by the appellee for that sum." In other words, consider how you might be affected yourself:—

Mr. TRIMBLE: I object to that as an improper measure of damages.

The COURT: Of course the court will tell the jury that is not the measure of damages. If counsel desires to make that kind of statement, the jury will hear it and then the court will tell them what the law is as he understands it.

Mr. PERCY: I call attention to these decisions as being of weight, but in view of what the court has said and in view of the objection of my exceedingly technical friend, lest some error may creep into this record by reason of his objection, I withdraw the remark, gentlemen of the jury, and request you all not to consider it.

Mr. Percy also said:

"I have here the first case that reached the Supreme Court of the United States in which this act was construed, the case of Johnson *v.* The Southern Pacific Co. It was decided in 1904. The act was passed in 1893 and carriers got extension after extension of time, and so it was that no case for final decision ever came to the Supreme Court of the United States until the Johnson case got there, and in the Johnson case it was insisted that he was not entitled to recover because he got hurt in a dining car and the dining car only ran part of the way through a state and then hooked on to another train and run part of the way on that, and that therefore, it was not engaged in interstate commerce and he couldn't recover. What did the court say about it? The court said in discussing the case, that they must look to the whole scope of the act, that they must look to the humanitarian purpose embodied in the act. The court says: 'President Harrison in his annual message of 1888, 1899, 1890, 1891 and 1892 earnestly urged upon congress the necessity of legislation to obviate and reduce the loss of life and the injury due to prevailing methods of coupling and braking. (Continues to read from the decision.)

(Defendant objects.)

The COURT: I understood counsel was addressing the court.

Mr. TRIMBLE: Your honor has already ruled that you would submit the case to the jury; there's no other question before the court except what the jury will decide; this has nothing to do with anything that's to go to the jury and I object to it.

The COURT: Counsel will keep himself within the rules.

Mr. PERCY: I think it perfectly competent; I hate to be trimmed down.

The COURT: If you are addressing it to the court, the court will hear you, if it pertains to the subject.

Mr. PERCY: If your honor says it isn't pertinent, to this case, I will stop."

"The COURT: It is perti-ent to the policy of the law; everybody concedes the policy of the law to be proper. I shall sustain the exception.

Mr. PERCY: Well, this is some mighty good law and awful good facts, coming from a very sound opinion.

The COURT: Yes, I agree to all that; the point he makes is that it has no application to this case at this time."

3rd. Because the court erred in the charge given to the jury excepted to at the time as follows:

"Now, the Act of Congress under which the plaintiff seeks to recover in this case and on which he founds his cause of action is known, as I said before, as the Safety Appliance Act, and that law provides that on and after the 1st day of January, 1898, it shall be unlawful for any common carrier, that means any railroad engaged in interstate commerce, to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers automatically by impact and which can be uncoupled without the necessity of going between the ends of the cars. That act also provides that any employee of any common carrier who may be injured by any locomotive, car or train, in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge.

In this case there is no question, so far as I have heard raised, as to the fact that this defendant company is a railroad engaged in interstate commerce, hauling interstate traffic. There is a question made as to whether or not this car that had the alleged crippled coupler was a car being used in hauling of interstate commerce within the meaning of this act. I think for the proof, gentlemen of the jury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident, and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case."

4th. Because the court erred in the charge given to the jury and excepted to at the time, as follows:

"If you conclude that he did that as a reasonably prudent man with his experience and his observation and the facts and circumstances in the case as I have detailed or undertook to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct in the manner in which he attempted to couple that car, was such that a reasonably prudent man situated as he was under all the facts and circumstances that surrounded him there would not have attempted to do it, and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence, and that negligence, if you believe it, was the proximate cause of the injury, would be such as to bar him in this action and that question I leave to you entirely without intimating any opinion about it."

5th. The court erred in saying to the jury on exception taken to the foregoing paragraph of the charge, the following:

"No, that's not the statement I intended to make; I withdrew the proximate cause; I was going on another idea; what I said to

the jury was, or what I intended to say and will say now, that if you believe from all the testimony in the case that this accident was caused by the negligent conduct of the plaintiff in the manner in which he intended to make that coupling, that would bar him from recovery."

Wherefore, the said St. Louis & San Francisco Railroad Company prays that the judgment of the Circuit Court of the United States for the Western Division of the Western District of Tennessee be reversed.

C. H. TRIMBLE, *Attorney.*

Writ of Error.

Filed August 24, 1907. Dan F. Elliotte, Clerk.

The United States Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable Judge of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court, before you, or some of you, between E. M. Delk, plaintiff, and the St. Louis & San Francisco Railroad Company defendant a manifest error hath happened, to the great damage of the said St. Louis & San Francisco Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals of the Sixth Circuit, together with this writ, so that you have the same at Cincinnati in said circuit, on the 21st day of September next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of August, 1907, and in the year of Independence of the United States of America, the one hundred and thirty-second.

Attest:

[SEAL.] DAN F. ELLIOTTE, *Clerk,*
By E. J. HEIDEL, *D. C.*

Allowed this 23rd day of August, 1907.

JNO. E. McCALL, *Judge.*

The United States Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA,
Sixth Judicial District, ss:

To E. M. Delk, Greeting:

You are hereby cited and admonished to be and appear at the session of the United States Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, Ohio, in said circuit, on the 21st day of September, 1907, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of the Western Division of Tennessee, wherein the St. Louis & San Francisco Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of August, in the year of our Lord, one thousand nine hundred and seven, and of the Independence of the United States of America, the one hundred and thirty-second.

[SEAL.] JNO. E. McCALL,
United States District Judge.

We hereby, this 4th day of September, 1907, accept the personal service of this citation, on behalf of E. M. Delk.

W. A. PERCY.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee:

I, Dan F. Elliotte, Clerk of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, do hereby certify that the papers hereto attached are full, true, perfect and correct copies of the originals and of the entire record and proceedings including the original writ of error and citation in said court as the same now appears of record and upon the files in my office, in the following cause, to-wit:

No. 3886. Law.

E. M. DELK
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

In testimony whereof, I have hereunto written my name and affixed the seal of said court at my office in the city of Memphis, Tennessee, this 17th day of September, A. D., 1907, and of the Independence of the United States the 132nd year.

[SEAL.] DAN F. ELLIOTTE, *Clerk.*

Authentication.

I, Jno. E. McCall, a judge of said court, do hereby certify that Dan F. Elliotte, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, clerk of said court, and that his attestation is in due form.

JNO. E. McCALL,
Judge of the District Courts of the United States for the District Aforesaid.

And afterwards to wit on September 30, 1907, praecipe for appearance of counsel was filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

1747.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.
vs.
E. M. DELK.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the St. Louis & San Francisco Railroad Co.

C. H. TRIMBLE,
Memphis Trust Bl'dg.
W. F. EVANS,
Frisco Bl'dg, St. Louis, Mo.

And afterwards towit on January 15, 1908, an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

1747.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Plaintiff in Error,
vs.
E. M. DELK, Defendant in Error.

The application of the Interstate Commerce Commission for leave to file a brief and to argue orally the construction of the Act of Congress involved in this case as *amicus curiae* is hereby granted.

And afterwards towit on February 12, 1908, an entry was made in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

1747.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.
vs.
E. M. DELK.

This cause is argued by Mr. Lon O. Hocker for the plaintiff in error and is continued until tomorrow for further argument.

And afterwards towit on February 13, 1908, an entry was made in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

1747.

St. Louis & San Francisco Railroad Co.
vs.
E. M. Delk.

This cause is further argued by Mr. Luther M. Walter as *amicus curiae* on behalf of the Interstate Commerce Commission, Mr. W. A. Percy and Mr. T. F. Kelly for the defendant in error and by Mr. C. H. Trimble for the plaintiff in error and is submitted to the Court.

And afterwards towit on March 3, 1908, judgment was entered in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

St. Louis & San Francisco Railroad Co.
vs.
E. M. Delk.

Before Lurton, Severens, and Richards, Circuit Judges.

Error to the Circuit Court of the United States for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Tennessee and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be and the same is hereby reversed with costs and the case is remanded to the said Circuit Court with directions to award a new trial.

And afterwards towit on Mar. 17, 1908, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

Filed Mar. 17, 1908. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

1747.

St. Louis & San Francisco Railroad Company, Plaintiff in Error,
v.
E. M. Delk, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Tennessee.

Submitted February 13, 1908; Decided March 3, 1908.

Before Lurton, Severens, and Richards, Circuit Judges.

This is an action in which the plaintiff, Delk, sought to recover damages for a personal injury suffered by him, as he alleges, in consequence of the negligence of the railroad company in failing to provide that protection for his safety which the law requires, while he was engaged in coupling freight cars in its yard at Memphis. At the trial he obtained a verdict, and judgment was entered in his favor. The cause was brought here on writ of error; and upon the suggestion of the Interstate Commerce Commission that the Safety Appliance Act of 1893 was involved, and upon its request, and the assent of the defendant in error, this court permitted special counsel for the Government to participate in the argument at the hearing and be heard upon the question of the construction and application of the Act. This is the principal question in the case and is the one upon which the judgment of the court is turned. The statement of the facts made by the special counsel in his brief is, with some slight additions, adopted as correct, and is this:

"The car alleged to be defective was what is known as K. C. F. S. & M. No. 21696. The car was loaded with lumber consigned from Giles, Ark., to Memphis, Tenn. The car arrived in Memphis September 28, 1906, at 4:30 p. m., and was delivered by the plaintiff in error to the Union Railway Company of Memphis, commonly called "The Belt Line," October 2, for delivery to the consignee. The car was returned to the plaintiff in error by the Union Railway Company of Memphis, October 3, at 7:30 a. m., on account of there being a defect in the coupling and uncoupling appliance on one end of the car. The car was in a string of nine cars on what is known as the "dead track" in defendant's new yard. This dead track was a team track; that is, the track was so arranged that teams might load from or into the car into or from wagons hauled alongside the car.

"On the morning of October 4, 1906, defendant in error, acting under instructions of the plaintiff in error, undertook to switch certain cars out of the string of nine cars so as to get two empty cars

and three coal cars for removal to some other portion of the defendant's line. The cars were on a track extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The easternmost two cars, being empties, were left on the lead track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but, owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C., F. S. & M. No. 21696 was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock pin or lock block. The drawbar also had a lateral motion of four inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers would couple by impact. In so doing, his foot was badly injured. Plaintiff in error had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt Railway on account of the defect in the coupler, plaintiff in error's inspector placed a red card about three inches by six inches upon the car, and with a blue pencil wrote on said card, "Out of order." This card is what is commonly known as a "bad order" card. The car had been on this team track from 7:30 a. m., on the 3d until 10 or 11 o'clock on the 4th, when the accident to defendant in error occurred.

"There was evidence tending to show that the inspection was made in the latter part of the 3rd and that the inspector thereupon ordered an employee to go to the repair shops which were some two and a half miles distant and get the material for repairing the coupler, but that the employee did not return until after the accident. The trial court held that the Safety Appliance Act applied to the car with the defective coupler and that by virtue of section eight of said act, plaintiff in error was denied the defense of assumption of risk on the part of defendant in error, and stated the language of the Act to the jury."

SEVERENS, Circuit Judge having made the preceding statement, delivered the opinion of the court:

The question which seems first in order is one raised by the plaintiff in error, and is whether the car to which the defective coupling was attached was at the time of the accident employed in interstate commerce. The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for

the delivery to the consignee wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and was being hauled upon its tracks when the accident occurred. *Johnson v. Southern Pacific Co.*, 196 U. S. 1; *Chicago, M. & St. P. Ry. Co. v. Voelker* 129 Fed. 522.

The principal question involved in this controversy relates to the construction and effect of the Safety Appliance Act, so called, enacted by Congress, March 2, 1893. The Act is entitled,

"An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Inter-state Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes and their Locomotives with Driving-Wheel Brakes, and for Other Purposes."

Section two provides,

"That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

Section six provides,

"That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed."

And section eight provides,

"That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The contention for the defendant in error is that the effect of these provisions is such as to have required the railroad company, in the conditions, to have had upon this car an automatic coupler, such as is described in Section 2 and further to have had it at the time when the plaintiff (below) undertook to make the coupling, in good sound working order, so that he would not have been obliged to go between the cars to effect the couplings; and that it is of no consequence that it had at some time previously, no matter how near, been in good order; or whether the railroad company had been at fault in not sooner having it repaired; in short, that the only question in respect to the railroad company's conduct is whether at the time of the accident it had equipped the car with prescribed coupling apparatus and had it then in good order.

On the other hand the railroad company contends that it had complied with its duty if it had equipped the car with the prescribed coupling apparatus and had used due diligence in endeavoring to keep it in good order. It may be admitted that upon a casual reading of the statute it might be that the impression would be taken that the duty is absolute and without any qualification by the circumstances. The court below gave the law to the jury by stating the language of the statute, and in such a way as to lead the jury to suppose that it imposed an absolute duty to keep the car in order, and applied to the circumstances of the case on trial. But the duty of the court goes deeper than this, where the statute, in order to be understood, requires construction. It is bound to consider the conditions to which the statute applies. And if it is seen that in its practical application doubts and difficulties arise, it becomes its duty to scrutinize the statute and resolve whether by a sensible construction of it, those difficulties may be avoided. Being bound to administer the law it is obliged to determine what the law really means and explain it to the jury. These duties are inseparable but they are equally obligatory. The general rules of interpretation are presumed to be familiar to the courts and it is the right of the parties who are affected by the result to have them properly applied. In 2 Sutherland on statutory construction Sec. 453, 2nd Ed., it is said:

"Statutes are but a small part of our jurisprudence. The principles of the common law pervade and permeate everything which is subject to legal regulation. Such law defines rights and wrongs of every description and the remedies for public and private redress. By its principles statutes are read and construed. They supplement or change it, and it adjusts itself to the modification and operates in conjunction and harmony with them. * * * Rules of interpretation and construction are derived from the common law, and since that law constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles."

By "doubts and difficulties" we, of course, do not mean those which are engendered by the predilection of the court or its own notions of what the law ought to be, but doubts and difficulties which are inherent in the nature of the problem to be solved. These propositions we presume no one will deny, and it may be thought a work of supererogation to state them. But they are not always remembered by those who make unthinking haste to reach what they believe to be a desideratum. Questions of difficulty arise in the application of this statute. Some of them have been solved or attempted to be solved by the courts to which they have been presented.

The first rule of construction which occurs is that we are to have regard to the scope and purpose of the statute, not so much the general purpose as the immediate purpose of this particlar enactment. For, if we look too intently upon some ultimate good we would wish to accomplish we are very liable to distort the law or make out of it some other enactment than that which the legislature has in fact passed. We think the immediate purpose of Congress in

this enactment, in the respect we are now considering it, is that disclosed by its title, wherein it is declared to be "An Act to promote the safety of employees and travellers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers &c." The general purpose is to promote the safety of employees and travellers; but the immediate purpose of the Act is to prescribe a way of doing this, namely, by compelling common carriers to equip their cars with automatic couplings. The method or means by which the ultimate good is expected to be accomplished is the subject of the enactment. The safety of employees &c. is a thing beyond, an expected result of the enactment, which latter is the substantive thing before us for interpretation. True, we should have regard to the result intended for it, but we cannot carry into it words foreign to its meaning, or strain those used beyond their fair import. By this reference to the title to the Act we do not mean that the title is competent to override any express language in the enacting parts, but simply as a clue or an index pointing to the right construction of what follows. It is of the more significance in that, instead of using general language, it specifically signalizes the very purpose of the Act and embraces the whole of it, differing in this respect from the class of statutes which Mr. Justice Field was considering and instanced in *Haddon v. Berney*, 5 Wall. 107, where the subjects of legislation were so heterogeneous that it could not be expected that the title would with any reasonable certainty indicate the scope and purpose of the Act. To the extent to which we propose this use of the title we are justified by several decisions of the Supreme Court. *United States v. Fisher*, 2 Cr. 358; *Church of the Holy Trinity v. United States*, 143 U. S. 457; *Coosaw Mining Co. v. South Carolina* 144 U. S. 550; *Patterson v. Bark Eudora*, 190 U. S. 169; *White v. United States*, 191 U. S. 545. In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 at page 611, Mr. Justice Story said:

"The title of the act puts this beyond all controversy; for it is "an act for incorporating certain persons for the purpose of building a bridge over Charles river, between Boston and Charlestown, &c." But, then, we are told, that no rule in construing statutes is better settled, than that the title of an act does not constitute any part of the act. If, by this, no more be meant, than that the title of an act constitutes no part of its enacting clauses, the accuracy of the position will not be disputed. But if it is meant to say, that the title of the act does not belong to it, for any purpose of explanation or construction, and that, in no sense, is it any part of the act; I, for one, must deny that there is any such settled principle of law. On the contrary, I understand that the title of an act (though it is not ordinarily resorted to), may be legitimately resorted to, for the purpose of ascertaining the legislative intention, just as much as any other part of the act. In point of fact, it is usually resorted to, whenever it may assist us in removing any ambiguities in the enacting clauses. Thus, in the great case of Sutton's Hospital, 10 Co. 23, 24b, the title of an act of parliment was thought not unworthy to be examined, in construing the design of the act. In *Boulton v. Bull*, 2

H. Bl. 463, 500, the effect of the title of an act was largely insisted upon in the argument, as furnishing a key to the intent of the enacting clauses. And Lord Chief Justice Eyre admitted the propriety of the argument, and met it, by saying, that, in that case, he would, if necessary, expound the word "engine," in the body of the bill, in opposition to the title to it, mean a "method," in order to support the patent."

When we come to the enactment itself we find that in the second section it corresponds with what the title has heralded. It forbids the use of cars which have not been equipped with automatic couplers, which are a little more fully defined by adding that they are to be such as will obviate the necessity of going between the cars to uncouple them, or, as we are disposed to think, couple them. And this is all there is of the statute which by direct language imposes the duty upon the carrier in respect to the use of automatic coupling. But it is necessarily implied that the railroad company shall keep up the equipment, for it forbids the use of the cars without it. In this connection it seems proper to refer to the last clause in section 2 which is; "and which can be uncoupled without the necessity of men going between the ends of the cars." We understand this to be a part of the description of the type of the automatic couplings with which the cars must be equipped. And further, we may here remark that the coupling with which this car was equipped was of the kind required by the Act. Section 6 declares that the use of any car in violation of this provision of the Act shall constitute an offense punishable by a fine of one hundred dollars. And section 8 declares that the employee shall not be deemed to have assumed the risk occasioned by the failure of the railroad company to equip its cars as required by the second section.

Now, the statute clearly and positively devolves upon the railroad company the duty of equipping its cars with those couplers and makes it a penal offense to use its cars without them. All this is simple enough. The company could make no mistake about it. But we can find no warrant for imposing such drastic consequences upon the failure of the railroad company to at all times and under all circumstances have the couplings in repair. One of the recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and another is that it is not to be presumed that the statute was intended to displace the former law whether it be statute or common law, further than was fairly necessary to give it place and operation. Now prior to this enactment other methods were employed by railroad companies for coupling their cars, generally, if not universally, by a link and pins. And the law was that in respect of this coupling the company was bound to exercise that reasonable degree of diligence in keeping them in repair which was proportionate to the danger of their use. The rule was expressed in various forms, but that was the substance. Conceiving that the new form or method of automatic coupling by impact would mitigate the danger to employees, it enacted this statute to compel the carrier to substitute the new form for the old in

operating its cars; and of course it is necessarily implied that it shall be done in good faith as is always implied in the enactment of laws. If the carrier does this, it has complied with the requirement of the statute and the old method is displaced by the new. But it is now proposed to add to the obligation of the carrier, by requiring that he shall be bound to see that the substituted coupling shall at all times and places be in good order, a burden well nigh to impossible. The coupling apparatus on railroad cars is subject at all times while they are being operated, to almost constant wrench and strain. Much of the time the cars are connected up in trains running on time schedules, and under orders of train dispatchers which must be observed or fatal and disastrous consequences ensue. Moreover accidents to the couplings or unknown defects appear at places more or less remote from repair shops. It is reasonable and just to require that the carrier should exercise a high degree of care to keep the couplings in proper condition. But it seems unjust and unreasonable to say that having fulfilled its utmost duty in this regard, it should be held responsible for conditions which may occur without its fault. We do not say that Congress has not the power to impose such an obligation as it is contended this statute imposes; but what we mean to say is that if a statute seems to impose obligations so extraordinary and difficult to perform, the courts would be bound to see whether the language employed is not susceptible of a more reasonable construction. Undoubtedly there are many cases in the multitude of statutes where the command is so imperative and unconditional that there is no escape from an exact and literal observance. The industry of counsel has accumulated a considerable number of them in his brief. In such cases if the statute is within the power of the legislature, there is, as the phrase goes, "no room for construction," and the business of the court is simply to administer the law as it is written. But this in no wise relieves the court from the duty of construing statutes which are not of that character but are subject to the amelioration which the common law affords by its rules of construction. But with regard to this statute, on turning back from the consideration of the consequences to the language employed, we find nothing which in terms imposes such an obligation. It is said to be implied; and the singular result is that instead of shading down the express language of an act so that it shall not have an effect which we cannot suppose to have been intended by the legislature, we should by implication infer an intent which, if seemingly expressed, we should be bound, if fairly possible, to suppose did not exist. Then again the statute is penal. The facts which would be necessary to maintain a criminal prosecution are the same as those which would support a private action. The only difference would be in the greater certainty with which the facts should be proven. And in the construction of such statutes the court is not justified in extending their operation beyond the plain meaning of the language used into regions of doubt and uncertain implications.

In this case we do not think it could be held as matter of law that the railroad company was guilty of a violation of the statute. In

view of the evidence given at the trial, it was a question for the jury to determine as one of fact, whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened.

As we have said, questions have heretofore arisen in the courts upon the construction and application of this statute, among them the question most fully considered here; and there is some conflict in their decisions. In *United States v. Atchison, T. & S. F. Ry. Co.*, 150 Fed. 442, (Judge Lewis); *Voelker v. Chicago, M. & St. P. Ry. Co.* 116 Fed. 867, (Judge Shiras); *United States v. Illinois Central R. Co.*, 156 Fed. 185; *Elmore v. Seaboard Air Line R. Co.*, 41 S. E. Rep. 786 (Sup. Ct. Nor. Car.) and *Missouri Pacific Ry. Co. v. Blinkmeier* (Sup. Ct. Kansas, not yet reported) similar views in regard to this statute to those we have indicated as our own were expressed. It is proper to observe that the view of Judge Shiras in the Voelker case, 116 Fed. 867, are not there so clearly stated as in his charge to the jury printed in the record of that case, with which we have been supplied. Opposed to these decisions are the views expressed in *United States v. Southern Ry. Co.*, 135 Fed. 122, by Judge Humphrey; by Judge Whitson in *United States v. Great Northern Ry. Co.*, 150 Fed. 229, and possibly, by the Circuit Court of Appeals for the Eight Circuit, in *Chicago, M. & St. P. Ry. Co. v. Voelker*, 429 Fed. 522, where the court was reviewing the ruling of Judge Shiras in 116 Fed. 867, *supra*. We say "possibly," because there are several reasons for thinking that the Court of Appeals did not intend to decide anything to the contrary of the construction of the statute which we approve. There were two counts in the petition, one upon the statute and the other upon the common law liability for negligence. Upon the first count the court below had charged the jury in respect to the statutory liability in accordance with the view we take of it, and the Circuit Court of Appeals affirmed that ruling. It appears from the report that the railroad company made three points for reversal neither of which presented the question here presented. The court negatived each of them, and naturally did not go into questions not raised. It reversed the judgment upon another ground. It seems obvious enough that it is not an adverse decision. If we had thought it otherwise, we should have more anxiety about the correctness of our own view. Judge Humphrey expressed an adverse opinion but he finally rested his judgment upon another ground. But Judge Whitson cited Judge Humphrey's opinion and adopted the view which had been expressed by him but not made the final ground of decision.

It is urged that if the courts fail to give the statute the construction that it imposes an absolute duty, it defeats the purpose of Congress in enacting it and leaves the obligation of the carrier as vague as before. But we see no reason for this contention. The benefit of the equipment of the cars with that kind of "safety appliances" and the maintenance thereof, which, as we think, was the purpose of the law, is secured. The question about which the difference arises is simply whether in addition to supplying and maintaining the appliances, the carrier is absolutely bound to insure their constant

good order, or whether it is bound only to the extent of its best endeavor. The question whether it has fulfilled its duty in the latter respect is no more difficult of determination than such as are constantly arising in cases where negligence is charged in other conditions.

The court below instructed the jury in substance that it was competent for them to find that the plaintiff below was guilty of contributory negligence and if they did that he was not entitled to recover. But the railroad company insists that the evidence was so clear and positive that the court should have given a peremptory instruction that the jury should render their verdict for the defendant on that ground. But as the case must be remanded for a new trial, we need not express our opinion upon evidence which may not assume the same aspect upon the new trial.

The judgment must be reversed with costs and a new trial awarded.

LURTON, Circuit Judge, said: I entirely concur in the conclusion of the court and the interpretation given to the Car Coupler Act, but I cannot agree that this car was so clearly "in use" contrary to the provisions of that Act, as herein interpreted, as to take that question from the jury. I think the stoppage of this car on the dead track was not in any true sense an incident of its transportation in inter-state traffic. True its journey was not finished, but its further journey had been stopped because the next carrier refused to receive it with this defective coupler. There was evidence tending to show that it was not a case of a temporary stoppage, such as that in *Johnson v. Southern Pacific Company*, 196 U. S. 1, but a withdrawal from all use in any kind of traffic until it could be repaired. It was placed on a track where cars needing only light repairs were ordinarily placed and was tagged as in "bad order." There was also evidence tending to show that the effort to couple this car was solely for the purpose of holding the car, against gravity, in its place on this track until it could be repaired. A car withdrawn from its journey and held upon a dead track to be repaired is not in my judgment "a car in use" contrary to the provisions of the Car Coupler Act any more than a car in a shop awaiting repairs. In *Johnson v. Sou. Pac. Company*, before cited, the dining car having a defective coupler had not been withdrawn from its journey to be repaired. Its stoppage was one usual and incident to its journey and that it might be returned over its usual route in the ordinary course of the kind of inter-state commerce it was habitually engaged in. No question of withdrawal from traffic for the purpose of repairs was in that case. The point decided is well shown by the Chief Justice, where he says:

"Confessedly this dining car was under the control of Congress while in the act of making its inter-state journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of inter-state traffic so within the law."

The facts are quite like those recently considered by the Court of Civil Appeals of Tennessee, not yet reported, in the case styled *McLaughlin v. Union Railway Co.*, where that court held that a car

withdrawn for repairs was not a car in use contrary to the Act and the movement of such a car necessary to getting it into the shops was not a use which brought the car within the Car Coupler Act. See also *Railway v. Bowles*, 71 Miss. 1003 and *Taylor v. Boston Railway*, a Massachusetts case, 74 N. E. Rep. 591, being cases under state laws similar in character and presenting in such the question of whether a disabled car being handled as a "bad order" car for purposes incident to repair was a car engaged in service.

RICHARDS, Circuit Judge, dissenting:

The car which caused the injury had a defective coupler. It would not couple automatically. As a result, the plaintiff below, under orders, went between it and the car it was to be coupled to, and tried to force a coupling by using his foot. In consequence, his foot was caught in the impact of the cars and seriously injured. In the opinion of the majority, the question is discussed whether the car was being used in interstate traffic, and it was held by one of the judges, in which I concur, that the testimony showed the car was being so used. That question being so determined, it seems to me that, under the facts as shown by the record, the court was right in charging the jury as it did.

After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service, or that the company had sent for the required appliance, and would repair the car when it should be received.

Certainly no ground is suggested why the employé, to protect whose life and limb this act was passed, should be deprived of its benefit in a case like the present, where he has already suffered the very injury which a compliance with it would have prevented.

This is a case peculiarly within the provisions of the act. A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked "in bad order," and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn; but it was not, and the company kept on moving it about in connection with other cars, and finally ordered the injured employé to couple it to another car. This he tried to do with the natural result, and he has been crippled for life. The case amply justifies the verdict, and the judgment should be affirmed.

And afterwards towit on April 3, 1908, a petition for rehearing was filed in said cause which reads and is as follows:

Petition for Rehearing.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1747.

ST. LOUIS & SAN FRANSCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
E. M. DELK.

Petition of E. M. Delk, Defendant in Error, for Re-hearing and Brief in said Petition.

W. A. Percy, T. F. Kelley, Attorneys for E. M. Delk.

Now comes E. M. Delk, the defendant in error, and files this petition for a re-hearing, and prays that the judgment of this Court herein reversing the judgment in his favor, and remanding the cause to the Court below, be set aside and a re-hearing be granted him.

For ground of this application, he says that the Court in rendering its judgment of reversal failed to consider:

First. The trial judge charged that the Safety Appliance Statute applied because the car at the time of the injury was engaged in interstate commerce, but did not charge that the defendant was liable even though at and prior to the accident it was in the exercise of diligence in discovering and remedying the defective coupler. No request was made by the plaintiff in error for a charge as to the effect of exercise of diligence and care, and no exception was reserved to the action of the Court in failing to charge upon this proposition.

Second. The facts affirmatively showed that the plaintiff in error was not in the exercise of due diligence or ordinary care with reference to the defective coupler at the time of, or preceding the accident.

Third. The plaintiff in error, through its vice principal and foreman, with full knowledge of the defective condition of the coupler, directed the defendant in error to make the coupling.

A consideration of these points, we respectively submit, would require an affirmance of the judgment in favor of defendant in error. They are elaborated in the brief filed herewith.

W. A. PERCY.
T. F. KELLEY.
For E. M. Delk.

I certify that the foregoing petition for re-hearing is sound in law, in my judgment, and is not filed for the purpose of delay, but in good faith.

W. A. PERCY.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1747.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

E. M. DELK, Defendant in Error.

Brief for Defendant in Error on the Petition for Re-hearing.

This petition for re-hearing is based on the following paragraph of the opinion:

"In this case we do not think it could be held as matter of law that the railroad company was guilty of a violation of the statute. In view of the evidence given at the trial, it was a question for the jury to determine as one of fact, whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened."

With great diffidence I submit to the Court that the attention of the Court, in the consideration of this clause, was devoted to the question of the proper construction of the Safety Appliance Act, and inadvertently the rights of the defendant in error were overlooked. In this petition for rehearing, I have no quarrel whatever with the doctrine announced by the majority of the Court, that if the Railroad Company was shown by the proof to have been in the exercise of ordinary care, or reasonable diligence in repairing the defect, there would be no liability, but I earnestly insist that so construing the statute the plaintiff in error is not entitled to a reversal of the judgment in favor of Delk.

I base this contention upon two propositions:

First. The error of the trial judge in not submitting the question of diligence upon the part of the company to the jury was not preserved by the plaintiff in error so as to enable it to rely upon the error in this court.

Second. The facts affirmatively show that the plaintiff in error was not in the exercise of due diligence, or ordinary care, with reference to the defective coupler at or preceding the accident.

First. All that was said in the charge by the Court upon this subject is as follows:

"There is a question made as to whether or not this car that had the alleged crippled coupler was a car being used in hauling interstate commerce within the meaning of this act. I think from the proof, gentlemen of the jury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident, and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case."

The Court then proceeded to tell the jury that if in the attempt to make the coupling the plaintiff was injured by reason of his own contributory negligence he could not recover, but if his conduct was free from negligence he could recover. A consideration of that part of the charge above quoted shows the trial judge had in mind the question as to whether or not the putting of the car with the defective coupler on the sidetrack so withdrew it from transportation as to take it out of the provisions of the Safety Appliance Act. The trial judge did not have in his mind the question of whether or not the company was exercising due diligence toward repairing the car, or as to whether or not diligence in discovering and remedying a defective appliance would be an excuse, in the event of injury. All that was said in this section of the charge was that the act applied. This was no error, for the majority of the Court have held that the act did apply. The trial judge then proceeded to say, first, that the act applies, and "so the only proposition left for you to determine is whether or not if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case." Now there can be no doubt that this statement of the trial judge was correct. The only question in this case is, is the company liable under the facts of the case?

The Court then proceeded to charge upon the question of contributory negligence; the Court did not proceed to charge that if the jury should find that the defendant company was in the exercise of due diligence and care in discovering the defect and in undertaking to repair same, and notwithstanding such diligence upon the part of the company the plaintiff was injured, they should then find for the defendant. The charge is absolutely silent upon this proposition.

Now, let us see what was done by the attorney for the defendant to direct the mind of the Court to this omission in the charge, and the mind of the attorney for the plaintiff. It is quite manifest to this Court that had the proper exception been reserved the plaintiff's attorney would have seen to it that the charge was modified to meet the views of the attorney for the defendant if the Court had been in doubt. (Note the comment of plaintiff's attorney at the foot of page 66 of the Record.) Both the Court and the plaintiff were entitled to have this question brought to their attention, before error can be predicated upon it. This Court knows that the finding of the jury would have been just the same if this question of the exercise of diligence had been properly submitted to the jury, and this Court should, therefore, be slow to reverse this case upon an error which is purely technical and could not have influenced the result below. The attorney for the defendant presented no request embodying the views announced by the majority of the Court, and there is no error predicated because of the refusal of an instruction to that effect. As a matter of fact, the theory on which this Court has proceeded in reversing the case was one that was not in the mind of the attorney for the defendant below, and was not by him presented to the trial judge. I need not cite to this Court authority to the point that if the trial judge's charge is meager and insufficient that alone cannot be made ground for reversal. The duty is then imposed upon the

attorney whose case is not fully charged, to present special requests embodying his theory of the law.

Let us now consider the language of the exception:

"In the first place, we except to the ruling of your Honor in declining to direct a verdict for the defendant and that exception will be founded distinctly upon the ground that the proof shows as a matter of law contributory negligence on the part of the plaintiff and also that the statute which your Honor read to the jury, Sections 2 and 8 of the Safety Appliance Act, did not apply. We except to that part of your Honor's charge which instructs the jury that under this evidence the law does apply; your Honor expressly said that to them, and we except to that."

Compare the exception with the charge of the Court: You will see that the exception was to the point, that the Court erred in charging that the car was engaged in interstate commerce at the time of the accident. This was the whole theory of the defendant's attorney on the trial below. He thought that the car had been withdrawn from interstate commerce, by being placed on the team track. There is not in the exception a suggestion that the charge was insufficient, in that it did not charge the jury that while the act applied, yet if they found from the evidence that the company was in the exercise of due care and diligence in discovering the defect and in endeavoring to repair it, they should find for the defendant. I beg that your Honors read this exception and see if I am not right on this proposition. Mustn't the exception be plain and direct so as to leave no doubt as to what the exception is directed to? The defendant's counsel in making the exception expressly stated "that exception will be found distinctly upon the ground that the proof shows as a matter of law contributory negligence on the part of the plaintiff, and also that the statute which your Honor read to the jury, Sections 2 and 8 of the Safety Appliance Act, did not apply." Your Honor's opinion says that the statute does apply and that the car was engaged in interstate commerce. This exception, therefore, should have been overruled.

If this exception is sustained, the spirit if not the letter of Rule 10, Circuit Court of Appeals, and Rule 4, Supreme Court, is violated, for manifestly the plaintiff in error did not distinctly state the proposition of law which he now seeks to rely on.

2nd Edition, Foster's Federal Practice, 377.

The specific language of the charge is not excepted to, but in effect the theory of the charge is sought to be excepted to.

The case at bar called within—

Bock *vs.* Gassert, 149 U. S., p. 23.

Anthony *vs.* the L. & N. R. R., 132 U. S., 172.

The failure of the Court to charge on a material question of law is not the subject of an exception when no request for such charge was made on the trial.

Texas & Pac. Ry. *vs.* Volk, 151 U. S., p. 73.

In this case the trial judge did not charge on contributory negligence. The Court said: "The omission of the Court to instruct the jury on the subject of contributory negligence is not open to exception, because the bill of exceptions does not show that the defendant requested any instruction upon that subject."

In Isaac's *vs.* U. S., 159 U. S., 491, the Court sustains this principle in a capital case.

"The next assignment is to the charge 'that the *corpus delicti* could be established by circumstantial testimony witho-t that this circumstantial evidence should be such as creates cogent irresistible grounds of presumption.' Without any request on the part of the defendant to add the qualification suggested, there was no error in the charge actually given. It is no ground for reversal that the Court omits to give instructions where they were not requested by the defendant! It is sufficient that the Court gives no erroneous instructions."

This case is very much like the one at bar, where the Court charged that the statute applied, but did not charge the qualification as to the effect of diligence.

In Goldsby *vs.* the U. S., 165 U. S., page 77, where the Court failed to charge as to the weight in law to be attached to testimony introduced to establish an alibi, no such request having been made, it was held the assignment could not be considered.

In Tex. & Pac. Ry. Co. *vs.* Cody, 166 U. S., 607, the charge complained of, was that the trial court told the jury that if they found for the plaintiff they would find for him in any sum not exceeding $10,000. The Court said: "Nor was there error in respect of the question of damages. What the trial judge said in that respect, taken together, was not incorrect, and if the railway company had desired particular instructions in reference to the measure of damages it should have requested them, which it did not do."

To the same effect is Backus *vs.* Fort St. Union Depot, 169 U. S., 575.

Humes *vs.* U. S., 170, U. S., 209.
Williams *vs.* Simons, 70 Fed., 44.
Eastern Oregon Land Co. *vs.* Cole, 92 Fed., 953.

The Evidence Showed No Diligence or Care on the Part of the Railroad Co.

The opinion says "in view of the evidence given at the trial it was a question for the jury to determine as one of fact whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened." It seems to me that the Court in passing upon the wider question of the construction of the Safety Appliance Act wholly failed to consider the facts which affirmatively showed no diligence upon the part of the company.

The mechanism required by statute to be in good order was in bad order, and from this bad order the accident resulted. In such case, the burden of proof was on the master to show that in permit-

ting the condition of bad order to arise, or continue, he was without negligence, or was in the exercise of ordinary care. Even without the statute, where an appliance is furnished the servant, which becomes by use, out of repair and dangerous, and this conditions is a discoverable one, the burden is on the master to show that he exercised ordinary care in inspecting the appliance and discovering the defect, and that he was not lacking in ordinary care in not repairing the appliance before harm was done.

It is not incumbent on the servant at common law, after showing a lack of care in furnishing a safe appliance, or a safe place to work, to go further and show lack of care in the master in discovering the unsafe condition, when such condition would be disclosed by an inspection.

No attempt was made by the defendant to show diligence in discovering the defective condition of the coupler, or in repairing it, therefore the charge of the Court on this point was correct.

But we go further, and invite the attention of the Court to that evidence, which, without contradiction, shows the absence of ordinary care by the master.

"Negligence as to Inspection.

(1.) The defective car was defendant's car, St. L. & S. F., No. 21696, and was loaded with lumber at Giles, Arkansas, where it began its ill-fated journey at some undisclosed date. No inspection is shown to have been made at Giles, when the car arrived there, while there or on pulling out from there.

(2.) The car arrived in Memphis on September 28th, 1906, at 4:30 p. m. No inspection is even shown to have been made. It remained in the yard, until October 2nd, as disclosed by the record introduced by Mr. McGregory (the keeper of same), and such records did not show any inspection.

(3.) Delivered to the Belt Line (Union Railway Co.) or rather tendered to them on October 2nd, and was refused. The car was then returned to the yard at 7:30 a. m. on October 3rd, for a safety appliance. (McGregor's evidence, page 23, and Holmes' evidence, pages 51 and 52.)

The *Union Railway Company discovered the defective condition* of the car, when offered to it, and refused to receive or handle the car in its condition.

In the absence of evidence from the defendant, this is affirmative and controlling evidence, that an inspection by the defendant would have disclosed the defective coupler, and that the defendant was lacking in ordinary care in not having discovered the defective condition sooner.

"B. Negligence as to Repairing.

(1.) From October 3rd at 7:30 a. m., when this car got back in the yard and on this team track until the hour after accident on October 4th at about 11:00 a. m., this car remained on a much used

team track on which there was much switching and coupling, and was not repaired. The repair could have been made in ten minutes.

Holmes, 53.

(2.) The repair should have been made at once. This one car repairer says he repairs from nine to ten a day, or may be more in the busy season.

P. 56.

To let a car go thirty hours without repairing it would therefore be unusual.

(3.) And Holmes would have repaired the car on the evening of October 3rd, but he had no material handy.

"Not that evening, I didn't have the material the evening the car returned."

P. 52.

But he should have had the material. The negligent absence of of the usual and customary supplies caused an unreasonable and negligent delay, which ultimately resulted in the accident.

The car could have been repaired in the neighborhood of three hundred times, from the time the defect was brought to the company's attention until it was actually repaired. And in constant use all the while.

The testimony thus affirmatively shows that it was the defendant who was negligent in not repairing the coupler. *There is no reason assigned why it didn't send for the repair material on the day of the 3rd, as the car reached there early in the morning.*

Thus upon the consideration of the testimony, it is purely a moot question, whether the Court shall write this modification into the statute; if it were there by legislative enactment, the defendant, on the facts in this case, would be liable for a violation of the statute, for the proof fails to show that the defendant exercised ordinary care in discovering or repairing the defective coupler.

Act Done By Direction of Master.

There is still another reason why the car being engaged in interstate commerce the defendant was absolutely liable (contributory negligence not being now considered). When Delk went to make this coupling there was a bad order tag on the car. The defective condition of the coupler was obvious, yet with this knowledge the foreman of the engine, who stood in the relation of vice principal, directed Delk to make the coupling.

Q. Were you foreman at that time?

A. Yes, sir.

Q. Did you direct this man, had you directed this man to go on and make that coupling?

A. Yes, sir; I didn't make that coupling.

The COURT: But you directed him to do it?

A. Yes, we was trying to pick that car up.
Q. The two of you were trying to pick that car up, you say?
A. Yes, sir.
Q. And you stood there looking at him?
A. Yes, sir.

I respectfully submit to this Court, what difference does it make as to the diligence or lack of diligence upon the part of the defendant company in discovering and repairing the defective coupler in view of this testimony which I have just quoted, that the vice principal, with full knowledge of the defective instrumentality and full knowledge that the statute was being violated, directed or permitted the plaintiff to undertake the coupling?

In conclusion, with due deference to the Court, let me call your attention to the fact that this case is not primarily one brought to obtain a construction of a Federal Statute, but to secure compensation to this young man Delk, who has been crippled for life by an injury received while in the employ of the defendant company. We don't care about the statute being construed; we are only interested in getting a decision upon the case at bar upon the law and the evidence.

If a due regard is given to the law and the evidence, I respectfully submit that the opinion of the majority of the Court may stand as delivered upon the construction of the Safety Appliance Act, and yet the judgment below be affirmed.

W. A. PERCY,
T. F. KELLEY,
For Defendant in Error.

And afterwards towit on May 16, 1908 an order denying said petition for rehearing was entered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

1747.

St. Louis & San Francisco Railroad Co.
vs.
E. M. Delk.

The petition to rehear filed in this cause is hereby denied.

And afterwards towit on May 20, 1908 a petition to rehear said cause was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

1747.

S9. Louis & San Francisco Railroad Co., Plaintiff in Error,
vs.
E. M. Delk, Defendant in Error.

Petition of E. M. Delk, Defendant in Error, for Rehearing.

Now comes E. M. Delk, Defendant in Error, and files this petition for a rehearing, and prays that the judgment of this Court herein reversing the judgment in his favor, and remanding the cause to the Court below be set aside and a rehearing be granted him.

For ground of this application, he says that the Supreme Court of the United States on May 13, 1908, rendered an opinion in the case of St. Louis, Iron Mountain & Southern Railway Company *vs.* May Taylor, in which that Court laid down a rule construing the Federal Safety Appliance Act diametrically opposed to the rule laid down by this Court in its opinion heretofore filed in this case.

The case decided by the Supreme Court came from the Supreme Court of the State of Arkansas on writ of error and was decided by eight Justices, Mr. Justice Brewer concurring in the result. The case involved the construction of the Federal Safety Appliance Act, especially Section Five thereof. The trial Court charged the Jury that the Act placed upon common carriers, the absolute duty of keeping their cars in the condition named in the Statute. The Railroad Company requested a charge that when a carrier originally equipped its car, and thereafter used reasonable care to keep his equipment in good order, it had complied with the Statutory requirements. The Court refused to grant the request so to charge. Upon appeal to the Supreme Court of Arkansas, the case was affirmed, judgment having been entered in favor of the dependent widow. The Supreme Court of the United States upon this particular phase of the case, hald that there was no error in the trial Court. We quote a full portion of the opinion, which is pertinent to the case at bar:

The plaintiff in error raises another question which, for the reasons already given, we think is of a Federal nature. The evidence shown that draw bars, which as originally constructed, are of standard height, are lowered by the natural effect of proper use; that in addition to the correction of this tendency by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise the lowered draw bar to the legal standard; and in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor, or brakeman, to use as occasion demanded. On this state of the evidence, the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with draw bars of a standard height, and furnished shims to competent inspectors

and trainmen, and used reasonable care to keep the draw bars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the draw bars resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the question thus raised, upon which the Courts have differed, (158 Fed. 931) we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by Statute. We have nothing to do, but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no cars, *eight* loaded, or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the Railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibition of the law, and there arises from the violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the Courts. They have no responsibility for the justice or wisdom of legislation, and no duty, except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law making body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the Railroads, that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absured or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar, the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him, who suffers it, that is a hardship to him. If its burden is transferred as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress contemplating the inevitable hardship of such injuries and hoping to diminish the economic loss to the

community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case."

We submit, respectfully, that a careful consideration of the opinion of the Supreme Court above cited and set forth will support petitioner's request for rehearing, and will require an affirmance of the judgment rendered by the trial Court in favor of the defendant in error.

Wherefore, your petitioner, the defendant in error, prays that the judgment of this Court herein reversing the judgment in his favor and remanding the cause to the Court below, be set aside and a rehearing be granted him.

Respectfully submitted,

T. F. KELLEY,
W. A. PERCY,
Attorneys for E. M. Delk.

I certify that the foregoing petition for rehearing is sound in law, in my judgment, and is not filed for the purpose of delay, but in good faith.

T. F. KELLEY.

And afterwards towit on June 12, 1908, an order denying said petition for rehearing was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

1747.

St. Louis & San Francisco Railroad Co.
vs.
E. M. Delk.

The petition for rehearing filed in this cause on May 20, 1908, is hereby denied.

And afterwards towit on June 27, 1908, a dissenting opinion by Judge Richards was filed in said cause clothed in the words and figures as follows:

Dissenting Opinion.

Filed Jun- 27, 1908. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1747.

ST. LOUIS & SAN FRANCISCO R. R. COMPANY, Plaintiff in Error,
v.
E. M. DELK, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Tennessee.

Submitted June 8, 1908; Decided June 12, 1908.

Before Lurton, Severens, and Richards, Circuit Judges.

Dissenting Opinion of Judge Richards on the Motion to Rehear.

Although no opinion has been handed down upon the denial of the motion, I think for certain reasons I ought to state the grounds I dissent from it. This case was decided March 3, 1908, and I dissented then, stating my grounds. Subsequently, on May 18, 1908, the Supreme Court of the United States decided the case of *St. Louis, Iron Mountain & Southern Ry., v. Taylor, Admx.*, Mr. Justice Moody delivering the opinion. In the course of the opinion, it became necessary for the court to express its view of the operation and obligation of the Safety Appliance Law, and it stated, that, in enacting the law,

"The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body."

This was the view taken by the court below, and I could not do other than dissent from this court reversing the judgment because of action based on it. I dissent now for the purpose of pointing out that while the case has been sent back to grant a new trial to be conducted in accordance with the contrary view taken by this court of the effect of the act, seemingly such view is inconsistent with the one announced since by the Supreme Court.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of St. Louis & San Francisco R. R. Co. *vs.* E. M. Delk, No 1747, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 27th day of June, A. D. 1908.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which St. Louis & San Francisco Railroad Company is plaintiff in error and E. M. Delk is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Western District of Tennessee, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, *ss:*

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of record of the proceedings in this Court in the above entitled case heretofore certified by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 14th day of December, 1908, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

"United States Circuit Court of Appeals for the Sixth Circuit.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
E. M. DELK, Defendant in Error.

Stipulation.

Whereas, on Monday the 2d day of December A. D. 1908, the Supreme Court of the United States, on the petition of the above-named defendant in error, granted a writ of certiorari addressed to the Honorable Judges of the United States Circuit Court of Appeals

for the Sixth Circuit commanding said Judges to send to said Supreme Court of the United States the record and proceedings in the above entitled cause in order that said Supreme Court might act thereon; it is this 9th day of December A. D. 1908, stipulated and agreed by and between the attorneys of record for the above-named parties that the transcript of record now on file in the Supreme Court of the United States may stand as the transcript of the record and proceedings on the return to said writ of error.

T. F. KELLEY,
W. A. PERCY, &
F. D. McKINNEY,
Attorneys for Plaintiff in Error.
W. F. EVANS,
Attorney for Defendant in Error.

I further certify that the above is a true and correct copy of the said stipulation and of the whole thereof.

Witness my official signature and the seal of the said Circuit Court of Appeals at the city of Cincinnati, Ohio, in said Circuit this 14th day of December, 1908.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] File No. 21,393. Supreme Court of the United States. No. 597. October Term, 1908. E. M. Delk *vs.* St. Louis & San Francisco Railroad Co. Writ of Certiorari. Filed Dec. 14, 1908. Frank O. Loveland, Clerk.

[Endorsed:] File No. 21,393. Supreme Court U. S. October Term, 1908. Term No. 597. E. M. Delk, Petitioner, *vs.* St. Louis & San Francisco Railroad Co. Writ of Certiorari & return. Filed Dec. 17th, 1908.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No.

E. M. DELK, PETITIONER AND DEFENDANT IN ERROR,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, RESPONDENT AND PLAINTIFF IN ERROR.

Petition for a Writ of Certiorari to be Addressed to the Judges of the United States Circuit Court of Appeals for the Sixth Circuit.

Your petitioner E. M. Delk respectfully shows:

1. That on or about the 4th day of October, A. D. ~~1904~~ 1906, while in the performance of his duties as a switchman in the employ of the St. Louis and San Francisco Railroad Company at Memphis, Tennessee, said St. Louis and San Francisco Railroad Company being a common carrier engaged in interstate commerce by railroad, he suffered grievous personal injuries, permanent and painful in character, solely as the result of the failure on the part of said railroad company to comply, as in duty bound it should have done, with the requirements and provisions of certain acts of the Congress of the United States of America commonly known and referred to as the Federal Safety Appliance Laws.

So much of said laws as need be referred to in support of your petitioner's contentions hereinafter set forth are as follows:

The act of March 2, 1893 (27 Stats. at L., 531), entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," among other provisions contains the following:

> "SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

> "SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

Notwithstanding the provisions and requirements of said section 2 of said act, said St. Louis and San Francisco Railroad Company on the occasion in question did haul and permit to be used on its line a car used in moving interstate traffic not equipped with couplers which would couple automatically and which could be both coupled and uncoupled without the necessity of men going between the ends of the cars for the purpose of making or assisting in the making of such coupling, as the result of which wrong your petitioner received and suffered the injuries which constitute the basis of his suit.

The facts and circumstances attending the injuries so received by your petitioner, as found by the majority judges of the Circuit Court of Appeals and stated by them in their opinion rendered in explanation and support of their judgment here complained of, were as follows:

> "The car alleged to be defective was what is known as 'K. C. F. S. & M. No. 21696.' The car was loaded with lumber consigned from Giles, Ark., to Memphis, Tenn. The car arrived in Memphis September 28, 1906, at 4:30 p. m., and was delivered by the plaintiff in error (St. Louis and San Francisco R. R. Co.) to the Union Railway Company of Memphis, commonly called 'The Belt Line,' October 2, for delivery to the consignee. The car was returned to the plaintiff in error (St. Louis and San Francisco R. R. Co.) by the Union Railway Company of Memphis, October 3, at 7:30 a. m., on account of there being a defect in the coupling and uncoupling appliance on one end of the car. The car was in a string of nine cars on what is known as the 'dead track' in defendant's new yard. This dead track was a team track; that is, the track was so arranged that teams might load from or into the car into or from wagons hauled alongside the car.
>
> "On the morning of October 4, 1906, defendant in error (E. M. Delk, plaintiff in trial court), acting under instructions of the plaintiff in error (St. Louis and San Francisco R. R. Co.), undertook to switch certain cars out of the string of nine cars so as to get two empty cars and three coal cars for removal to some other portion of the defendant's line. The cars were on a track extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The easternmost two cars, being empties, were left on the lead track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three cars loaded with coal were left thereon. The engine, with the remaining two cars,

again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but, owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C. F. S. & M. No. 21696 was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock pin or lock block. The drawbar also had a lateral motion of four inches. Defendant in error (Delk) undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers would couple by impact. In so doing, his foot was badly injured. Plaintiff in error (St. Louis and San Francisco R. R. Co.) had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt railway on account of the defect in the coupler, plaintiff in error's (St. Louis and San Francisco R. R. Co.) inspector placed a red card about three inches by six inches upon the car, and with a blue pencil wrote on said card, 'Out of order.' This card is what is commonly known as a 'bad order' card. The car had been on this team track from 7:30 a. m., on the 3d until 10 or 11 o'clock on the 4th, when the accident to defendant in error (Delk) occurred.

"There was evidence tending to show that the inspection was made in the latter part of the 3d, and that the inspector thereupon ordered an employee to go to the repair shops which were some two and a half miles distant and get the material for repairing the coupler, but that the employee did not return until after the accident."

Upon this state of facts your petitioner instituted his suit in the Circuit Court for Shelby County, Tennessee, against the St. Louis and San Francisco Railroad Company to re-

cover compensation for the injuries so suffered by him, laying his damages in the sum of $10,000.00.

In his declaration, filed in said Circuit Court, petitioner averred that the defendant railroad company was a common carrier of freight and passengers engaged in interstate commerce, and that he, petitioner, was an employee of said company and that while engaged in the duties of his said employment, viz., in coupling certain cars used in interstate commerce, his foot was seriously and permanently injured by reason of the negligent and reckless failure of the defendant to have said cars properly equipped with safety couplers as required by the acts of Congress of March 2, 1893, above referred to.

The St. Louis and San Francisco Railroad Company was duly served with process and in due season filed its petition for the removal of said cause into the Circuit Court of the United States for the Western District of Tennessee, basing its right of removal *solely upon the diverse citizenship of the parties.*

The cause having been duly removed to and docketed in said Circuit Court of the United States, the defendant company pleaded by way of defense the general issue and contributory negligence on the part of the plaintiff, averring among other things that plaintiff—

> "Unnecessarily used his foot in order to shove under the knuckle of the drawhead and he carelessly allowed his foot to remain in that position until the cars came together. That the car was standing upon a curve and was, for this reason, difficult to couple and that this fact was well known to plaintiff, or should have been known to him in the exercise of ordinary care."

Upon the trial your petitioner introduced ample evidence in support of the facts above recited, and at the close of all

of the evidence submitted by both parties the learned trial judge charged the jury in pertinent part as follows:

> "Now the act of Congress under which the plaintiff seeks to recover in this case and on which he founds his cause of actions is known, as I said before, as the safety appliance act, and that law provides that on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier—that means any railroad engaged in interstate commerce—to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of (men) going between the ends of the cars. That act also provides that any employee of any common carrier who may be injured by any locomotive, car or train, in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge.
>
> "In this case there is no question raised, so far as I have heard, as to the fact that this defendant company is a railroad engaged in interstate commerce, hauling interstate traffic. There is a question made as to whether or not this car that had the alleged crippled coupler was a car being used in hauling interstate commerce within the meaning of this act. I think from the proof, gentlemen of the jury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident, and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case. Now the fact that this man went between the cars to couple them, although he knew that the coupler was broken, would not of itself prevent him from recovering in this case, if he was hurt while in there attempting to couple the cars, but I submit to you the proposition whether or not the manner, in

which he attempted to couple the cars, was of itself negligence on his part and whether that negligence was the proximate cause of his injury.

"You have heard all the facts and circumstances detailed here by the witnesses, just how he did that, and you will look to all those facts and circumstances, in determining whether or not he was guilty of negligence or whether or not the manner in which he attempted to couple that car the last time was contributory negligence. And in determining that question you will look to all the facts and circumstances, as I have said, and that includes the facts, if they be facts, that he was there, that he knew the car coupler was broken, was not according to the law, that he is a man who was experienced in the business in which he was engaged, that his immediate superior was there and had directed him to go in and couple the cars, if he did that, that he had gone in and made two efforts to couple the cars and had failed, he then put his foot upon this draw-head and attempted to hold it in place so that when the cars came back he could hold it in place and they would couple, and in doing so he braced himself on either side with each hand on the grab irons of the cars and with one foot on the ground; now it is for you to say, from all the facts and circumstances, those I have specifically referred to as well as all the others, whether the man, who was engaged in the business and had the experience he has had in that business and under the circumstances detailed here by the witnesses, attempted to make that coupling as a reasonably prudent man should have done under the circumstances or under like circumstances.

"If you conclude that he did that as a reasonably prudent man, with his experience and his observation and the facts and circumstances in the case as I have detailed or undertook to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct, in the manner in which he attempted to couple that car, was such that a reasonably prudent man situated as he was under all the facts and circumstances that sur-

rounded him there, would not have attempted to do it and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence, and that negligence, if you believe it was the proximate cause of the injury, would be such as to bar him in this action, and that question I leave to you entirely without intimating any opinion about it."

"Now if you decide that this party was guilty of such contributory negligence as would bar his action here under the law as I have stated, you need go no further; just state that you find in favor of the defendant.

"If you decide, however, that he was not guilty of negligence, that the manner in which he coupled these cars was not negligent, and that he is entitled to recover, then your next inquiry is, 'What amount is he entitled to recover?' There can be no fixed rule laid down for you to be guided by. You will look to see what the proof shows the expenses that he has incurred by reason of this accident, the doctors' bills, his medicine bills and other expenses that the proof may show that he has incurred. He would be entitled to recover that."

At the conclusion of this charge counsel for the defendant railroad company excepted to the refusal of the learned trial judge to direct a verdict for the defendant "upon the ground that the proof shows as matter of law contributory negligence on the part of the plaintiff" and also to that part of the charge "which instructs the jury that under this evidence the law (sections 2 and 8 of the safety appliance act) * * * does apply."

The trial judge, at the request of the defendant, further instructed the jury "that if they find the defendant was negligent and the plaintiff was also guilty of a want of ordinary

care in the manner in which he made the coupling that their verdict must be for the defendant."

The jury returned its verdict in favor of your petitioner, assessing his damages in the sum of $7,500.00, of which sum $2,500.00 was subsequently remitted by petitioner under the order of the trial court, and thereupon judgment upon the verdict was entered in favor of your petitioner and against the defendant railroad company for the sum of $5,000.00.

The defendant railroad company sued out a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to review said judgment and that court reversed the same with costs and remanded the cause to the Circuit Court for a new trial by a vote of two to one, Severens and Lurton, Circuit Judges, concurring in the judgment of reversal, while Richards, Circuit Judge, dissented. The opinions filed by each of the judges composing the Circuit Court of Appeals in this case are set forth in full in the transcript of record, pertinent extracts from each of which are as follows:

SEVERENS, *J.*:

> "The principal question involved in this controversy relates to the construction and effect of the safety appliance act, so-called, enacted by Congress, March 2, 1893."
>
> * * * * * * *
>
> "The contention for the defendant in error is that the effect of these provisions is such as to have required the railroad company, in the existing conditions, to have had upon this car an automatic coupler, such as is described in section 2, and, further, to have had it at the time when the plaintiff below undertook to make the coupling in good sound working order, so that he would not have been obliged to go between the cars to effect the coupling; and that it is of no consequence that it had at some time previously, no matter how near, been in good order; or whether the railroad company had been at fault in not sooner

having it repaired; in short, that the only question in respect to the railroad company's conduct is whether at the time of the accident it had equipped the car with the prescribed coupling apparatus, and had it then in good order.

"On the other hand the railroad company contends that it had complied with its duty if it had equipped the car with the prescribed coupling apparatus, and kept it so equipped, and had used due diligence in endeavoring to keep it in good order. It may be admitted that upon a casual reading of the statute it might be that the impression would be taken that the duty is absolute and without any qualification by the circumstances. The court below gave the law to the jury by stating the language of the statute, and in such a way as to lead the jury to suppose that it imposed an absolute duty to keep the car in order, and applied to the circumstances of the case on trial. But the duty of the court goes deeper than this, where the statute, in order to be understood, requires construction. It is bound to consider the conditions to which the statute applies. And if it is seen that in its practical application doubts and difficulties arise, it becomes its duty to scrutinize the statute, and resolve whether, by a sensible construction of it, those difficulties may be avoided."

* * * * * * *

"Now, the statute clearly and positively devolves upon the railroad company the duty of equipping its cars with those couplers, and makes it a penal offense to use its cars without them. All this is simple enough. The company could make no mistake about it. But we can find no warrant for imposing such drastic consequences upon the failure of the railroad company to at all times and under all circumstances have the couplings in repair.

* * * * * * *

"Now, prior to this enactment, other methods were employed by railroad companies for coupling their cars—generally, if not universally, by a link and pins. And the law was that in respect of this coupling the company was bound to exercise that reason-

able degree of diligence in keeping them in repair which was proportionate to the danger of their use. The rule was expressed in various forms, but that was the substance. Conceiving that the new form or method of automatic coupling by impact would mitigate the danger to employés, Congress enacted this statute to compel the carrier to substitute the new form for the old in operating its cars; and of course it is necessarily implied that it shall be done in good faith as is always implied in the enactment of laws. If the carrier does this, it has complied with the requirement of the statute, and the old method is displaced by the new. But it is now proposed to add to the obligation of the carrier by requiring that he shall be bound to see that the substituted coupling shall at all times and places be in good order, a burden well nigh to impossible. The coupling apparatus on railroad cars is subject at all times while they are being operated, to almost constant wrench and strain and liability to breakage. Much of the time the cars are connected up in trains running on time schedules, and under orders of train dispatchers which must be observed, or fatal and disastrous consequences ensue. Moreover, accidents to the couplings or unknown defects appear at places more or less remote from repair shops. It is reasonable and just to require that the carrier should exercise a high degree of care to keep the couplings in proper condition. But it seems unjust and unreasonable to say that having fulfilled its utmost duty in this regard, it should be held responsible for conditions which may occur without its fault. We do not say that Congress has not the power to impose such an obligation as if is contended this statute imposes; but what we mean to say is that if a statute seems to impose obligations so extraordinary and difficult to perform the courts would be bound to see whether the language employed is not susceptible of a more reasonable construction. Undoubtedly there are many cases in the multitude of statutes where the command is so imperative and unconditional that there is no escape from an exact and literal observance. The industry of counsel has accumulated a considerable number of them in his

brief. In such cases if the statute is within the power of the legislature, there is, as the phrase goes, 'no room for construction,' and the business of the court is simply to administer the law as it is written. But this in no wise relieves the court from the duty of construing statutes which are not of that character, but are subject to the amelioration which the common law affords by its rules of construction. But with regard to this statute, on turning back from the consideration of the consequences to the language employed, we find nothing which in terms imposes such an obligation. It is said to be implied: and the singular result is that instead of shading down the express language of an act so that it shall have an effect which we cannot suppose to have been intended by the legislature, we should by implication infer an intent which, if seemingly expressed, we should be bound, if fairly possible, to suppose did not exist. Then, again, the statute is penal. The facts which would be necessary to maintain a criminal prosecution are the same as those which would support a private action. The only difference would be in the greater certainty with which the facts should be proven. And in the construction of such statutes the court is not justified in extending their operation beyond the plain meaning of the language used into regions of doubt and uncertain implications.

"In this case we do not think it could be held as matter of law that the railroad company was guilty of a violation of the statute. In view of the evidence given at the trial, it was a question for the jury to determine as one of fact whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened."

LURTON, *J.*:

"I entirely concur in the conclusion of the court and the interpretation given to the Car Coupler act, but I cannot agree that this car was so clearly 'in use' contrary to the provisions of that act, as herein interpreted as to take that question from the jury."

RICHARDS, *J.* (dissenting):

"The car which caused the injury had a defective coupler. It would not couple automatically. As a result, the plaintiff below, under orders, went between it and the car it was to be coupled to, and tried to force a coupling by using his foot. In consequence, his foot was caught in the impact of the cars and seriously injured. In the opinion of the majority, the question is discussed whether the car was being used in interstate traffic, and it was held by one of the judges, a view in which I concur, that the testimony showed the car was being so used. That question being so determined, it seems to me that, under the facts as shown by the record, the court was right in charging the jury as it did.

"After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service, or that the company had sent for the required appliance, and would repair the car when it should be received.

"Certainly no ground is suggested why the employé, to protect whose life and limb this act was passed, should be deprived of its benefit in a case like the present, where he has already suffered the very injury which a compliance with it would have prevented.

"This is a case peculiarly within the provisions of the act. A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked 'in bad order,' and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn; but it

> was not, and the company kept on moving it about in connection with other cars, and finally ordered the injured employé to couple it to another car. This he tried to do, with the natural result, and he has been crippled for life. The case amply justifies the verdict, and the judgment should be affirmed."

The judgment of the Circuit Court based upon the verdict of the jury in favor of your petitioner was accordingly ordered to be reversed and the case to be remanded for a new trial.

It thus appears that the learned trial judge (McCall, J.) was of opinion, and so instructed the jury, that the intent and purpose of the Congress in enacting the law in question was to promote the safety of both passengers and employees on interstate carriers by railroad, by supplanting the qualified duty imposed upon such carriers by the common law with an absolute duty deemed by it to be more just, in which view Richards, J., concurred, while the majority judges of the Circuit Court of Appeals were of opinion that such carriers sufficiently complied with the requirements of said act if they but equipped their cars with the new form of couplers described therein, and thereafter used reasonable diligence in keeping such couplers in repair, further declaring that any question which might arise in such regard was for the determination of the jury.

2. Your petitioner further shows that the judgment of the Circuit Court of Appeals reversing the judgment of the trial court and here complained of, was entered in said cause on the 3d day of March, 1908, and the opinions of the learned judges of said Circuit Court of Appeals were filed in said cause on March 17, 1908; and that thereafter on, to-wit, the 3d day of April, 1908, a petition for rehearing was filed in said cause which was denied on the 16th day of May, A. D. 1908.

3. Thereafter on, to wit, the 18th day of May, A. D. 1908, this Honorable Court, speaking through Mr. Associate Justice Moody, delivered and filed its opinion in the matter of the case of the St. Louis, Iron Mountain and Southern Railway Company *vs.* May Taylor, Administratrix (210 U. S., 281), wherein, after referring to the provisions of the act of Congress hereinbefore referred to and quoted, it was said:

> "In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry. v. Delk,* 158 Fed. Rep., 931), we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power

of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employé and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

4. Thereafter on, to wit, the 20th day of May, 1908, the term of said Circuit Court of Appeals for the Sixth Circuit, at which the judgment against your petitioner here complained of was rendered, being still open, your petitioner filed a further petition for a rehearing of this cause, which petition was specifically based upon so much of the opinion of this honorable court rendered in the said case of the St. Louis, Iron Mountain & Southern Railway Company *vs.*

Taylor, administratrix, as is above set forth, which further petition for rehearing was formally denied on the 12th day of June, 1908, circuit judges Lurton and Severens concurring in the order of denial, and Richards, C. J., dissenting therefrom in the following language:

> "Although no opinion has been handed down upon the denial of the motion, I think for certain reasons I ought to state the grounds I dissent from it. This case was decided March 3, 1908, and I dissented then, stating my grounds. Subsequently, on May 18, 1908, the Supreme Court of the United States decided the case of St. Louis, Iron Mountain & Southern Ry. *v.* Taylor, Adm'x, 28 Sup. Ct., 616, 52 L. ed., Mr. Justice Moody delivering the opinion. In the course of the opinion it became necessary for the court to express its view of the operation and obligation of the safety appliance law, and it stated that, in enacting the law:
>
> > "'The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body.'
>
> "This was the view taken by the court below, and I could not do other than dissent from this court reversing the judgment because of action based on it. I dissent now for the purpose of pointing out that while the case has been sent back to grant a new trial to be conducted in accordance with the contrary view

taken by this court of the act, seemingly such view is inconsistent with the one announced since by the Supreme Court."

5. Your petitioner further shows that the conclusions reached by the majority of the Circuit Court of Appeals as evidenced by the judgment of reversal herein complained of, are also opposed in principle to the conclusions of this court as expressed in its opinion and judgment filed in the case of Johnson *vs.* Southern Pacific Company, 196 U. S., 1, on writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, wherein it was said that—

> "The intention of Congress, declared in the preamble and in §§ 1 and 2 of the act (of March 2, 1893) was 'to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers, * * * coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars' whereby the danger and risk consequent on the existing system was averted as far as possible." * * *
>
> "What the act plainly forbade was *the use of cars* which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars; and that object would be defeated not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars."
>
> "If the language used were open to construction, we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow. * * *

"The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law; and as there is no doubt of that intention here, the extent of the application of the change demands, at least, no more vigorous construction than would be applied to penal laws." * * *

"Tested by these principles, we think the view of the Circuit Court of Appeals, which limits the 2d section *to merely providing automatic couplers*, does not give due effect to the words 'coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars' and cannot be sustained." * * *

"The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated *by the use of couplers actually coupling automatically.*"

6. Your petitioner further shows that the conclusions so reached by said majority of said Circuit Court of Appeals for the Sixth Circuit are diametrically opposed to the conclusions and judgment of the Circuit Court of Appeals for the Eighth Circuit on similar issues involved in the case of United States *vs.* Atchison T. & Santa Fe Ry. Co., (not yet reported, see Appendix.) and to the conclusions and judgment of the Supreme Court of the State of South Carolina in Carson *vs.* Southern Railway Company, 46 Southeastern Reporter, 525, which judgment was affirmed by this court on writ of error, Southern Railway Co. *vs.* Carson, 194 U. S., 136, 140.

7. Your petitioner further shows that the questions involved in the issues presented in this cause are of grave public importance, affecting as they do the correlative rights, obligations, and duties under said act of Congress of March 2, 1893, between interstate common carriers by railroad and their great and ever increasing number of employees, and likewise affecting the duties and obligations of said common carriers and those members of the public at large who have

occasion from time to time to ride as passengers upon their trains.

That because of their grave public importance, and upon the suggestion and request of the Interstate Commerce Commission, special counsel for the United States was permitted to be heard in the Circuit Court of Appeals on the argument of the cause in that court.

Wherefore, because of the gravity and importance of the questions involved and in the interest of uniformity of decision, and so that a definite and certain rule respecting such rights, obligations, and duties may be established and declared, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the judges of the United States Circuit Court of Appeals for the Sixth Circuit, commanding them and each of them to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in the case lately depending therein, entitled "St. Louis and San Francisco Railroad Company, plaintiff in error, *vs.* E. M. Delk, defendant in error, No. 1747," to the end that the judgment of said Circuit Court of Appeals in said cause may be reviewed as provided in and by section six of the act of Congress, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem proper and in conformity with law.

And your petitioners will ever pray, &c., &c., &c.

E. M. DELK.

FREDERIC D. MCKENNEY,
LUTHER M. WALTER,
T. F. KELLEY,
W. A. PERCY,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Luther M. Walter, being first duly sworn, says that he is one of the attorneys for the petitioner, E. M. Delk; that he has read over the foregoing and annexed petition and knows well the contents thereof, and that he has also carefully read and studied a duly certified copy of the transcript of record under the seal of the United States Circuit Court of Appeals for the Sixth Circuit in the case of St. Louis and San Francisco Railroad Company, plaintiff in error, *vs.* E. M. Delk; that the matters of fact stated in said petition are fully supported in and by said transcript of record and are true to the best of his knowledge, information, and belief.

LUTHER M. WALTER.

Subscribed and sworn to before me this 29th day of October, A. D. 1908.

[SEAL.] H. S. MILSTEAD,
Notary Public, D. C.

In our opinion the foregoing and annexed petition for certiorari is well founded in law.

FREDERIC D. MCKENNEY,
LUTHER M. WALTER,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

As the jurisdiction of the Circuit Court of the United States for the Western District of Tennessee, as invoked by the petition for removal filed therein in the cause here at bar, depended solely upon the respective parties to the cause being citizens, and residents of different States, the Circuit Court of Appeals had jurisdiction on writ of error to render final judgment therein.

To review the judgment entered by said Circuit Court of Appeals in such a cause, a writ of certiorari from this court will lie.

While this court exercises its discretionary power of issuing such writs, but sparingly, it will require a case to be certified to it by a Circuit Court of Appeals when the circumstances of such case show that the importance of the questions involved, or the necessity of avoiding conflict between two or more Circuit Courts of Appeals, or between Circuit Courts of Appeals and the Supreme Court of a State, demands its exercise.

Forsyth *vs.* Hammond, 166 U. S., 506.

While this court will not ordinarily issue a writ of certiorari to review an interlocutory decree of the Circuit Court of Appeals, it may, and will do so if necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Construction Co. *vs.* Jacksonville, &c., Co., 148 U. S., 372.

The power of this court to require a case to be certified to it under the provisions of the act of March 3, 1891, is not affected by the condition of the case as it may exist in the

Circuit Court of Appeals, but such power may be exercised before or after any decision by such Circuit Court of Appeals, and irrespective of any ruling or determination therein.

Forsyth *vs.* Hammond, 166 U. S., 506.

The fact that the Circuit Court of Appeals may have issued its mandate in the cause will not preclude the issuance of a writ of certiorari by this court to review the decision of the Circuit Court of Appeals.

The Conqueror, 166 U. S., 110.

And any lack of finality in the decree of the Circuit Court of Appeals complained of, will not prevent its issuance.

American Con. Co. *vs.* Jacksonville, &c., R. Co., 148 U. S., 372.

Southern Pacific Co. *vs.* Johnson, 196 U. S., 1.

Harriman *vs.* Northern Securities Co., 197 U. S., 244.

In addition to the grave public character of the questions involved in this cause, and in view of the exigency of the matter incident to the lack of uniformity between the decisions of certain Circuit Courts of Appeals of the United States and between a Circuit Court of Appeals of the United States and a Supreme Court of a State, and also between the Circuit Court of Appeals of the Sixth Circuit and the Supreme Court of the United States, in so far as the proper construction to be given to the second section of the act of March 2, 1893, at least is concerned, it may not be amiss also to call attention to the fact that the wrong of which the petitioner complains and which resulted in the injuries from which he still suffers occurred more than four years ago; that he instituted his suit in the Circuit Court of Shelby County, Tennessee, in October, 1906, and that by reason of his extreme poverty and consequent inability to bear the expenses of the suit, an order was duly passed in the cause permitting him to prose-

cute the case *in forma pauperis;* that the petitioner has since the last above mentioned date been continually involved in the processes of litigation incident to the establishment of his rights asserted in this cause, and that the final and authoritative disposition of the matter at as early day as possible is devoutly to be wished, and in view of the fact that the construction of the second section of the act of March 2, 1893, for which he contends, appears to have been already established in analogous cases decided by this honorable court, it would seem that to require him to return to the Circuit Court of the United States for the Western District of Tennessee and there to retry his cause *de novo* under the erroneous theory of law propounded by the majority judges of the Circuit Court of Appeals for the Sixth Circuit, would be to impose upon him a grievous hardship and to involve the further prosecution of the cause and its final disposition in extraordinary inconvenience, embarrassment, and delay.

Upon the case made out in the petition it is respectfully submitted that the writ of certiorari addressed to the judges of the United States Circuit Court of Appeals for the Sixth Circuit, should be issued as prayed.

FREDERIC D. MCKENNEY,
LUTHER M. WALTER,
T. F. KELLEY,
W. A. PERCY,
Attorneys for Petitioner.

NOTICE.

To C. H. TRIMBLE,
Attorney for St. Louis and San Francisco Railroad Company.

SIR: You will please take notice that on Monday the 16th day of November, A. D. 1908, at 12 o'clock noon, or as soon thereafter as counsel may be heard, the foregoing petition and accompanying brief will be submitted to the Supreme Court of the United States, at its usual place for holding its sessions in the Capitol, at Washington, D. C., for its consideration and action, at which time and place you will please take such action in the premises as you may be advised.

FREDERIC D. MCKENNEY,
LUTHER M. WALTER,
T. F. KELLEY,
W. A. PERCY,
Attorneys for E. M. Delk, Petitioner.

ADMISSION OF SERVICE.

Service of a copy of the foregoing petition, brief, and notice acknowledged this — day of November, A. D. 1908.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 2566.—May Term, A. D. 1908.

UNITED STATES
v.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

(IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.)

(*Syllabus by the Court.*)

The safety appliance law of Congress, in the situations in which it is applicable, imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances in operative condition, and is not satisfied by the exercise of reasonable care to that end. (*St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor,* 210 U. S. 281.)

Before Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge.

(Decided August 22, 1908.)

VAN DEVANTER, *Circuit Judge,* delivered the opinion of the court:

This writ of error challenges a judgment for the defendant in a civil action to recover a penalty for an alleged violation of the safety-appliance law of Congress embodied in the acts of March 2, 1893, 27 Stat. L., 531; April 1, 1896, 29 Stat. L., 85, and March 2, 1903, 32 Stat., 943. Stripped of matters about which there is no controversy here, the violation charged consisted in hauling a car, in the usual course of transportation, when one of the couplers thereon was broken and inoperative, so that it could not be coupled or uncoupled

without the necessity of a man going between the ends of the cars. The trial was to a jury, and the single question presented to us is whether or not the duty of the defendant, in respect of the maintenance of the coupler in an operative condition, was correctly stated in the portion of the court's charge, which reads:

"The act, however, must necessarily have a reasonable construction. These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railway companies to use prudence and the ordinary diligence of a business man, keeping in view the purposes of the act, to keep these couplings in repair. * * * And it is for you to determine in this case whether or not the defendant used reasonable case in ascertaining whether the car was in good repair, and then, again, whether the defendant used reasonable care in putting the coupler in good repair, after it ascertained that it was out of repair. If you find that it did use reasonable care in both instances, then it is not liable, and you should return a verdict in favor of the defendant; otherwise, you should find for the United States."

Applying to the evidence the law as so interpreted, the jury returned a verdict for the defendant, which the court declined to disturb upon a motion for a new trial. (United States *v.* Atchison, etc., Ry. Co., 150 Fed., 442.)

That the interpretation of this law of Congress has been attended with difficulty is attested by many varying opinions in the reported cases, and that there are considerations tending to sustain the construction placed upon it by the district court is attested by the opinion rendered upon the motion for a new trial and by the sustaining opinions in other cases, notably St. Louis and San Francisco Railway Company *v.* Delk, —— C. C. A. ——, 158 Fed., 931; but as we read the opinion of the Supreme Court in the more recent case of St. Louis, Iron Mountain and Southern Railway Company *v.* Taylor, 210 U. S., 281 (S. C., 71 Ark., 445; 83 Ark., 591), it is now authoritatively settled that the duty of the railway company, in situations where the Congressional law is applicable, is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the nonliability of the master for the negligence of a fellow-

servant were invoked by the railway company and were held by the court to be superseded by the statute, it being said in that connection (p. 294):

"In deciding the questions thus raised, upon which the courts have differed (St. Louis & S. F. Ry. *v.* Delk, 158 Fed. Rep., 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and appliances, or consider when or how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is prescribed. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation can not clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just."

While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employee, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed upon the railway company, section 5 relating to drawbars is the same as section 2 relating to couplers, and section 6 relating to the penalty is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty.

Because, in view of the later decision in the Taylor case, the instruction before quoted did not embody a correct statement of the law, the judgment is reversed with a direction to grant a new trial.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

E. M. DELK, PETITIONER,
v.
ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY. } No. 597.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION OF THE UNITED STATES FOR LEAVE TO BE HEARD.

Because of the grave public importance of the questions involved in this case, and upon the suggestion and request of the Interstate Commerce Commission, the Attorney-General, on behalf of the United States, respectfully prays the court for leave to be heard in support of the petition for a writ of certiorari herein, and at the hearing of the merits in the event that the court shall grant the writ.

The case involves the proper construction of section 2 of the safety appliance act of March 2, 1893 (27 Stat., 531), which provides:

> That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul

> or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

The petition shows that Delk, who was employed as a switchman at Memphis, Tenn., by the St. Louis and San Francisco Railroad Company, a common carrier engaged in interstate commerce, suffered a serious and permanent injury to his foot while undertaking to couple together two cars, one of which had a defective coupler which would not couple automatically. The facts found by the majority of the Circuit Court of Appeals and stated in their opinion show that the defect in the coupling appliance referred to was known to the railroad company, that although orders had been given for the repair of the coupler the car was not withdrawn from service in the meantime, but was continued in use up to the time when the accident occurred; that the defect consisted of a break in the lock pin or lock block, which caused a disconnection of the chain connecting the uncoupling lever to the lock pin, the drawbar also having a lateral motion of 4 inches; that petitioner tried to accomplish the coupling by holding the drawbar away with his foot from the side upon which he stood, and that in so doing his foot was severely injured.

Suit was instituted by petitioner first in the state court, and was thence removed to the Circuit Court

of the United States for the Western District of Tennessee, where a verdict was entered against the railroad company for the sum of $5,000. On writ of error the Circuit Court of Appeals for the Sixth Circuit reversed the judgment and remanded the cause for a new trial (Severens, J.; Lurton, J., concurring; Richards, J., filing a dissenting opinion). (St. Louis & S. F. R. Co. *v.* Delk, 158 Fed. Rep. 931.) Two applications for rehearing were successively denied.

The Circuit Court of Appeals based its action upon the ground that the law, while requiring an interstate railroad company to equip its cars with automatic couplers, does not require it to keep such couplings at all times and under all circumstances in good order and repair, which the court declared to be "a burden well-nigh to impossible."

It is submitted that such a construction of the statute, if allowed to stand, would tend to defeat completely the objects for which the law was enacted; and, moreover, the conclusions of the Circuit Court of Appeals are in direct opposition to the views expressed by this court, and are in conflict with other decisions of the lower federal courts. If it is not the duty of a carrier under the law, after a car has been properly equipped but the equipment has become defective, and the carrier is aware of that fact, to withdraw the car from service until the defect is repaired, then the law is very weak at a vital point. A car with a defective equipment is a constant menace to

employees so long as it is in use; it is liable at any time to cause an accident, and the railroad company in permitting its use under such conditions renders itself liable to the penalty of the law just as much as though it had failed to furnish the requisite equipment altogether; for if a coupler through some defect ceases to couple automatically by impact, and thereby necessitates the intervention of a man between the cars, it is for all purposes no better than the old link and pin couplings with their great risk to life and limb, which was the principal evil sought to be remedied by the act.

As this court said in the case of *Johnson* v. *Southern Pacific Co.* (196 U. S., 1), in which, it will be recalled, the United States was permitted to be heard:

> What the act plainly forbade was *the use of cars which could not be coupled together automatically by impact,* by means of couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars.

In that case it was contended by the defendant that the requirements of the law were met if cars were furnished with automatic couplers, even when they were of different types which would not couple together automatically.

In the present case the Circuit Court of Appeals held that "it was a question for the jury to determine whether the railroad company should, if it

had used reasonable diligence, have put the coupling in repair before the accident happened."

It is submitted that the question of reasonable diligence is no defense in such suits as this to recover damages for injuries resulting from the use of cars having defective equipment. That such is the view of this court is, I think, plain from the language used by Mr. Justice Moody delivering the opinion of the court in *St. Louis and Iron Mountain Ry.* v. *Taylor* (210 U. S., 266, 294, 295). There another provision of the safety-appliance law was involved relating to the requirement as to height and variation of drawbars for freight cars. Referring to the contention, among others, that the defendant had used reasonable care to keep the drawbars at a reasonable height and thus had complied with its statutory duty, the court said:

> In deciding the questions thus raised, upon which the courts have differed (*St. Louis and S. F. Ry.* v. *Delk*, 158 Fed. Rep., 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and appliances. * * * The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with

> the standard." There is no escape from the meaning of these words. * * * The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just.

Answering the contention that this is a harsh construction, the court replied that "if it be the true construction its harshness is no concern of the courts," and pointed out that where an injury happens through defective equipment there must be hardship somewhere, and that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, no doubt deemed it wise "to impose their burdens upon those who could measurably control their causes instead of upon those who are in the main helpless in that regard."

See also the decisions in United States *v.* Southern Ry. Co., 135 Fed. Rep., 122; United States *v.* Great Northern Ry. Co., 150 Fed. Rep., 229; Chicago, M. & St. P. Ry. Co. *v.* Voelker (C. C. A., 8th Circuit), 129 Fed. Rep., 522, in all of which it was held that where a coupler is defective it is no defense that the carrier exercised reasonable care and diligence to keep the apparatus in repair.

In the case of *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.*, recently decided by the Circuit Court of Appeals for the Eighth Circuit, and not yet reported, the facts were exactly similar to those in the present case. There the court reversed the judgment of the trial court upon the ground that by the decision

in *St. Louis & Iron Mountain Ry.* v. *Taylor* "it is now authoritatively settled that the duty of the carrier is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute."

Thus it is seen that the conclusions reached by the Circuit Court of Appeals in the present case are in conflict with those of the Circuit Court of Appeals for the Eighth Circuit and other Federal courts; they are also in conflict with the judgment of the Supreme Court of the State of South Carolina in *Carson* v. *Southern Ry. Co.* (46 S. E. Rep., 525), which was affirmed by this court in the case of *Southern Ry. Co.* v. *Carson* (194 U. S., 136); and they are opposed to the principles declared by this court in *Johnson* v. *United States*, and in *St. Louis & Iron Mountain Ry.* v. *Taylor* (supra). In view, therefore, of this lack of harmony and uniformity in the decisions of the courts, and of the grave importance to the public of the issues involved, the Attorney-General earnestly and respectfully expresses the hope that the court may see fit to grant the writ in this case, and in that event to permit the United States to intervene and take part in the argument on the merits.

CHARLES J. BONAPARTE,
Attorney-General.

O

No. [redacted]88.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

[redacted]

E. M. DELK, PETITIONER AND DEFENDANT IN ERROR,

vs.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, RESPONDENT AND PLAINTIFF IN ERROR.

ON PETITION FOR A WRIT OF CERTIORARI TO BE ADDRESSED TO THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT,

St. Louis & San Francisco Railroad Company.

W. F. EVANS,
Attorney for Respondent.

E. C. TOOF & SON, PRINTERS, MEMPHIS.

SUPREME COURT of THE UNITED STATES

OCTOBER TERM, 1908.

No. 594.

E. M. DELK, Petitioner and Defendant in Error,

vs.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Respondent and Plaintiff in Error.

On Petition for a Writ of Certiorari, to Be Addressed to the Judges of the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT.

St. Louis & San Francisco Railroad Company.

The questions considered by the Circuit Court of Appeals in this case were three in number, viz.: (1) Whether the car upon which the defective coupler was located was in use in interstate commerce, contrary to law, at the time of the injury; (2) whether the defect being shown, and an injury having occurred, the liability of the company was absolute, without any regard to whether it was possible for the defendant, in the exercise of ordinary care, to have discovered and remedied the defect before the injury occurred, and

(3) whether the record showed that the plaintiff had been guilty of contributory negligence, which would operate as a defense as a matter of law.

As to the second question, Judges Lurton and Severens concurred that the liability of the carrier was not absolute, under all circumstances, on a mere showing of a defect; that there might be circumstances where lack of opportunity to discover and repair would be a defense, and that that question in this case was for the jury.

As to the first question in the original opinion (158 Fed. Rep., p. 933), Judge Severens said: "But we are inclined to think otherwise," i. e., that the car was engaged in interstate commerce at the time of the injury. Judge Lurton thought otherwise.

As to the third question, this was noticed, but not decided, by the Court, the Court saying that it was unnecessary to decide it in view of the conclusion that the case should be reversed on other grounds.

In addition to this there were three other assignments of error (the second, fourth and fifth), Rec. pp. 73, 74, 75, which were not in any way noticed by the Court, and no ruling upon them was set forth in any opinion.

As stated by counsel for petitioner, after the decision of this Court in the case of St. Louis, Iron Mountain & Southern Railway Company v. May Taylor, 210 U. S. —, a second petition to rehear was filed. This was dismissed without any opinion being rendered by the majority.

As it cannot be supposed for a moment that that Court intended to ignore or defy the opinion of this

Court in that case, it follows that that Court must have concluded finally to rest its adherence to the order of reversal upon some ground not in conflict therewith.

But all of this is immaterial. The case now presented is one where a judgment of the Circuit Court has been reversed, the case remanded, and stands now for trial at the November term, 1908, of the Circuit Court for the Western District of Tennessee.

It is enough to say in opposition to this application that no final judgment has been rendered, and that private, and not public, interests are involved. The case is distinctly ruled by Chicago & Northwestern Railway v. Osborn, 146 U. S. 354, as approved and explained in Forsythe v. Hammond, 166 U. S. 514. The Osborn case arose under the interstate commerce law, and in the popular mind involved as much the safety of the nation as the present case.

The authorities cited by petitioners do not sustain their position. In Johnson v. Southern Pacific Railroad Co., 196 U. S. 1, there was a final judgment in the Appellate Court. In the case of The Conqueror, 166 U. S. 110, there was a final decree. Forsythe v. Hammond was a peculiar case of conflict of decision between State and Federal courts, involving the territorial limits of a municipality, and possibilities of very unseemly internal disturbances between two sovereignties. In American Construction Company v. Jacksonville, etc., Ry., 148 U. S. 372, certiorari was allowed solely to determine whether a judge making orders was disqualified, and his orders void. Such grounds as are relied on here were deemed insufficient in that case.

The case of The Three Friends, 166 U. S. 1, affords an example of what is a public question in this connection. Railway v. Osborne, supra, is an example of what is not.

In Forsythe v. Hammond, this Court said of the power to issue the writ:

> * * * "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations demands such exercise."

There is no necessity shown for the present interference or supervision of this Court, in advance of final judgment.

There is nothing to show that plaintiff will be embarrassed in any degree by improper rulings, in the further prosecution of the case, much less that there will be extraordinary embarrassment.

We respectfully submit that the application should be denied.

W. F. EVANS,
Attorney for Respondent.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

E. M. DELK, Petitioner,
vs. No. 88.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT OF FACTS, ASSIGNMENTS OF ERROR AND BRIEF FOR PLAINTIFF IN ERROR.

T. F. KELLY,
W. A. PERCY,
For Plaintiffs in Error.
LUTHER M. WALTER, of Counsel.

STATEMENT OF FACTS.

The statement of facts as set out in the majority opinion of the Court is all that need now be said in reviewing the judgment of that Court. It is as follows (Rec. p. 75 et seq.):

"The car alleged to be defective was what is known as 'K. C. F. S. & M. No. 21696.' The car was loaded with lumber consigned from Giles, Ark., to Memphis, Tenn. The car arrived in Memphis September 28, 1906, at 4:30 p. m., and was delivered by the plaintiff in error (St. Louis & San Francisco R. R. Co.) to the Union Railway Company of Memphis, commonly called 'The Belt Line,' October 2, for delivery to the consignee. The car was returned to the plaintiff in error (St. Louis & San Francisco R. R. Co.) the by Union Railway Company of Memphis, October 3, at 7:30 a. m., on account of there being a defect in the coupling and uncoupling appliance on one end of the car. The car was in a string of nine cars on what is known as the 'dead track' in defendant's new yard. This dead track was a team track; that is, the track was so arranged that teams might load from or into the car into or from wagons hauled alongside the car. (N. B.—It was called "dead track" by the trainmen, because it was next to a cemetery! Rec. p. 23.)

On the morning of October 4, 1906, defendant in error (E. M. Delk, plaintiff in trial court), acting under instructions of the plaintiff in error (St. Louis & San Francisco R. R. Co.), undertook to switch certain cars out of the string of nine cars so as to get two empty cars and three coal cars for removal to some other portion of the defendant's line. The cars were on a track extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The easternmost two cars, being empties, were left on the lead track. The remaining seven cars

were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but, owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C. F. S. & M. No. 21696 was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock pin or lock block. The drawbar also had a lateral motion of four inches. Defendant in error (Delk) undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers would couple by impact. In so doing, his foot was badly injured. Plaintiff in error (St. Louis & San Francisco R. R. Co.) had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt railway on account of the defect in the coupler, plaintiff in error's (St. Louis & San Francisco R. R. Co.) inspector placed a red card about 3 inches by 6 inches upon the car, and with a blue pencil wrote on said card, 'Out of order.' This card is what is commonly known as a 'bad order' card. The car had been on this team track from 7:30 a. m.,

on the 3d, until 10 or 11 o'clock on the 4th, when the accident to defendant in error (Delk) occurred.

There was evidence tending to show that the inspection was made in the latter part of the 3d, and that the inspector thereupon ordered an employe to go to the repair shops, which were some two and a half miles distant, and get the material for repairing the coupler, but that the employe did not return until after the accident."

This statement ought to be supplemented as to the exact details of the accident by adding that these two cars would not therefore couple together automatically by impact without a person going between the cars (31-58). The plates on each side of the drawhead of car No. 21696 were worn off and gone and the drawhead had a slack of about four inches (30-31-55). The team track is on a slight curve, and plaintiff could not see and direct the engineer in the manipulation of the train. (See picture on page 50.) He first tried to open the knuckle of car No. 21696 by removing the broken pin down in the drawhead, with his fingers, but it was hung and he could not get the knuckle open. (31.) If he could have opened this knuckle, the cars would have coupled. He then tried twice to get the car to couple by impact (32-51), thinking that, by gently striking the drawheads together, the half-open knuckle on the Chicago drawhead (of car No. 21696) (30-51-38-58) would slip into the Gould and catch; but the slack in the drawhead of the defective car, caused by the absence of the plates on each side of the drawhead and the

"C" rods running through the bottom of the car, would cause the drawhead to slip over and close the half-open knuckle of the Chicago coupler. (30-31-39-40 and 44.) The drawheads did not pass each other in either of these two attempts because the car was moved slow and easy, but the defective drawhead would tip over because of the lost motion and close the other knuckle insteaed of slipping into it, as intended, and this was illustrated during the trial with the drawheads set like they were at the time of the accident. Plaintiff could not see the engineer and he controlled the movement of the train by signaling the engineer through his foreman, helper or other person, following the engine. It is not shown whether or not the signal was given to the engineer as plaintiff gave it. This was the customary way of coupling these cars, and the engineer always complied with the signal given by the man doing the coupling. (32-33.)

After the two unsuccessful attempts to couple the cars, as aforesaid, they stood about two and one-half feet apart (30-38). In order to hold this loose draw head in place and thereby make the drawheads meet, and effect the coupling, and for the purpose of getting the greatest power against the side of the drawhead of car No. 21696, plaintiff placed his foot back behind the jaw of said drawhead, while the car was standing still, and bracing himself by catching hold of the grab irons provided for such emergencies on each car (for greater leverage) and with his other foot on the ground, he sought to hold over the recalcitrant drawhead until the knuckles could meet and

dove-tail into each other (31-32-33). The end sought would have been thereby attained. This was the only way it could be done. (32.) It was the usual way to make the couplings, and plaintiff had seen it safely done a thousand times. (32.) After he pushed over the drawhead and had everything in readiness, for the knuckles to catch into each other, and while the car was still stationary, he gave the signal for the engineer to come back slowly over the two and one-half feet intervening between the cars. But instead of coming back slowly, the engineer came back rapidly and with great force. (30-33.) By reason of the violent collision and said defects, the drawhead missed coupling and the defective drawhead jumped over and passed the other one and plaintiff's foot was thrown or jerked between the knuckles and mashed to a pulp. (30-31-33.) There would not have been so much, if any, danger if the cars had been backed together slowly, in accordance with plaintiff's signal, but plaintiff's mind was concentrated on this stubborn drawhead and the force of the collision upset and surprised him and caused his foot, on which he had the most of his weight, to slip past the protruding jaw of the knuckle and catch between the faces of the drawheads. (42.) Plaintiff could not have pushed the drawhead over with his hand, and if he had done so, then his body would have been thrown between the drawheads, instead of his foot.

Upon substantially this state of facts the plaintiff instituted his suit in the Circuit Court for Shelby County, Tennesese, against the St. Louis & San

Francisco Railroad Company to recover compensation for the injuries so suffered by him, laying his damages in the sum of $10,000.

In his declaration, filed in said Circuit Court, plaintiff averred that the defendant railroad company was a common carrier of freight and passengers, engaged in interstate commerce, and that he, petitioner, was an employe of said company, and that while engaged in the duties of his said employment, viz., in coupling certain cars used in interstate commerce, his foot was seriously and permanently injured by reason of the negligent and reckless failure of the defendant to have said cars properly equipped with safety couplers, as required by the acts of Congress of March 2, 1893, above referred to.

Rec. pp. 3-4, 9-10.

The St. Louis & San Francisco Railroad Company was duly served with process and in due season filed its petition for the removal of said cause into the Circuit Court of the United States for the Western District of Tennessee.

The cause having been duly removed to and docketed in said Circuit Court of the United States, the defendant company pleaded by way of defense the general issue and contributory negligence on the part of the plaintiff, averring among other things that plaintiff—

> "Unnecessarily used his foot in order to shove under the knuckle of the drawhead and he carelessly allowed his foot to remain in that position until the cars came together. That the car was

standing upon a curve and was, for this reason, difficult to couple and that this fact was well known to him in the exercise of ordinary care."

Rec. p. 7.

Upon the trial plaintiff introduced ample evidence in support of the facts above recited, and at the close of all of the evidence submitted by both parties the learned trial judge charged the jury in pertinent part as follows (Rec. p. 57 et seq.):

"Now, the act of Congress under which the plaintiff seeks to recover in this case and on which he founds his cause of actions is known, as I said before, as the safety appliance act, and that law provides that on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier—that means any railroad engaged in interstate commerce—to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers automatically by impact and which can be uncoupled without the necessity of (men) going between the ends of the cars. That act also provides that any employe of any common carrier who may be injured by any locomotive, car or train, in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge.

"*In this case there is no question, so far as I have heard, as to the fact that this defendant company is a railroad engaged in interstate commerce, hauling interstate traffic. There is a question made as to whether or not this car that*

had the alleged crippled coupler was a car being used in hauling interstate commerce within the meaning of this act. I think from the proof, gentlemen of the jury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident, and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case. Now, the fact that this man went between the cars to couple them, although he knew that the coupler was broken, would not of itself prevent him from recovering in this case, if he was hurt while in there attempting to couple the cars, but I submit to you the proposition whether or not the manner in which he attempted to couple the cars was of itself negligence on his part and whether that negligence was proximate cause of his injury.

You have heard all the facts and circumstances detailed here by the witnesses, just how he did that, and you will look to all these facts and circumstances, in determining whether or not he was guilty of negligence or whether or not the manner in which he attempted to couple that car the last time was contributory negligence. And in determining that question you will look to all the facts and circumstances, as I have said, and that includes the facts, if they be facts, that he knew the car coupler was broken, was not according to the law, that he is a man who was experienced in the business in which he was engaged, that his immediate superior was there and had directed him to go in and couple the cars, if he did that, that he had gone in and made two efforts to couple the cars and had

failed, he then put his foot upon this drawhead and attempted to hold it in place so that when the cars came back he could hold it in place and they would couple, and in doing so he braced himself on either side with each hand on the grab irons of the cars and with one foot on the ground; now it is for you to say, from all the facts and circumstances, those I have specifically referred to as well as all the others, whether the man, who was engaged in the business and had the experience he has had in that business and under the circumstances detailed here by the witnesses, attempted to make that coupling as a reasonably prudent man should have done under the circumstances or under like circumstances.

If you conclude that he did that as a reasonably prudent man, with his experience and his observation and the facts and circumstances in the case as I have detailed or undertook to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct, in the manner in which he attempted to couple that car, was that a reasonably prudent man situated as he was under all the facts and circumstances that surrounded him there, would not have attempted to do it and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence, and that negligence, if you believe it was the proximate cause of the injury, would be such as to bar him in this action, and that question I leave to you entirely without intimating any opinion about it.

Now, if you decide that this party was guilty of such contributory negligence as would bar his action here under the law, as I have stated, you need go no further; just state that you find in favor of the defendant.

If you decide, however, that he was not guilty of negligence, that the manner in which he coupled these cars was not negligent, and that he is entitled to recover, then your next inquiry is, 'What amount is he entitled to recover?' There can be no fixed rule laid down for you to be guided by. You will look to see what the proof shows the expenses that he has incurred by reason of this accident, the doctors' bills, his medicine bills and other expenses that the proof may show that he has incurred. He would be entitled to recover that."

At the conclusion of this charge counsel for the defendant railroad company excepted to the refusal of the learned trial judge to direct a verdict for the defendant "upon the ground that the proof shows as matter of law contributory negligence on the part of the plaintiff" and also to that part of the charge "which instructs the jury that under this evidence the law (Sections 2 and 8 of the safety appliance act) * * * does apply."

Rec. p. 59.

The trial judge, at the request of the defendant, further instructed the jury "that if they find the defendant was negligent and the plaintiff was also guilty of a want of ordinary care in the manner in which he made the coupling that their verdict must be for the defendant."

The jury returned its verdict in favor of the plaintiff, assessing his damages in the sum of $7,500, of which sum $2,500 was subsequently remitted by plaintiff under the order of the trial court, and thereupon judgment upon the verdict was entered in favor of your plaintiff and against the defendant railroad company for the sum of $5,000.

Rec. p. 60.

The defendant railroad company sued out a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to review said judgment, and that Court, Feb. 12, 1908, reversed the same with costs and remanded the cause to the Circuit Court for a new trial by a vote of two to one, Severens and Lurton, circuit judges, concurring in the judgment of reversal, while Richards, circuit judge, dissented. The opinions filed by each of the judges composing the Circuit Court of Appeals in this case are set forth in full in the transcript of record, pertinent extracts from each of which are as follows (Rec. p. 76, et seq.):

SEVERENS, J.:

> "The principal question involved in this controversy relates to the construction and effect of the safety appliance act, so called, enacted by Congress, March 2, 1893.
>
> * * * * * *
>
> The contention for the defendant in error is that the effect of these provisions is such as to have required the railroad company, in the existing conditions, to have had upon this car an

automatic coupler, such as is described in Section 2, and, further, to have had it at the time when the plaintiff below undertook to make the coupling in good sound working order, so that he would not have been obliged to go between the cars to effect the coupling; and that it is of no consequence that it had at some time previously, no matter how near, been in good order; or whether the railroad company had been at fault in not sooner having it repaired; in short, that the only question in respect to the railroad company's conduct is whether at the time of the accident it had equipped the car with the prescribed coupling apparatus, and had it then in good order.

On the other hand, the railroad company contends that it had complied with its duty if it had equipped the car with the prescribed coupling apparatus, and kept it so equipped, and had used due diligence in endeavoring to keep it in good order. It may be admitted that upon a casual reading of the statute it might be that the impression would be taken that the duty is absolute and without any qualification by the circumstances. The Court below gave the law to the jury by stating the language of the statute, and in such a way as to lead the jury to suppose that it imposed an absolute duty to keep the car in order, and applied to the circumstances of the case on trial. But the duty of the Court goes deeper than this, where the statute, in order to be understood, requires construction. It is bound to consider the conditions to which the statute applies. And if it is seen that in its practical application doubts and difficulties arise, it becomes its duty to scrutinize the stat-

ute, and resolve whether, by a sensible construction of it, those difficulties may be avoided.

* * * * * *

Now, the statute clearly and positively devolves upon the railroad company the duty of equipping its cars with those couplers, and makes it a penal offense to use its cars without them. All this is simple enough. The company could make no mistake about it. But we can find no warrant for imposing such drastic consequesces upon the failure of the railroad company to at all times and under all circumstances have the couplings in repair.

* * * * * *

Now, prior to this enactment, other methods were employed by railroad companies for coupling their cars—generally, if not universally, by a link and pins. And the law was that in respect of this coupling the company was bound to exercise that reasonable degree of diligence in keeping them in repair which was proportionate to the danger of their use. The rule was expressed in various forms, but that was the substance. Conceiving that the new form or method of automatic coupling by impact would mitigate the danger to employes, Congress enacted this statute to compel the carrier to substitute the new form for the old in operating its cars; and of course it is necessarily implied that it shall be done in good faith as is always implied in the enactment of laws. If the carrier does this, it has complied with the requirement of the statute, and the old method is displaced by the new. But it is now proposed to add to the obligation of the carrier by requiring that he shall be bound to see that the substituted coup-

ling shall at all times and places be in good order. a burden well-nigh to impossible. The coupling apparatus on railroad cars is subject at all times while they are being operated to almost constant wrench and strain and liability to breakage. Much of the time the cars are connected up in trains running on time schedules, and under orders of train dispatchers which much be observed, or fatal and disastrous consequences ensue. Moreover, accidents to the couplings or unknown defects appear at places more or less remote from repair shops. It is reasonable and just to require that the carrier should exercise a high degree of care to keep the couplings in proper condition. But it seems unjust and unreasonable to say that having fulfilled its utmost duty in this regard, it should be held responsible for conditions which may occur without its fault. We do not say that Congress has not the power to impose such an obligation as it is contended this statute imposes; but what we mean to say is that if a statute seems to impose obligations so extraordinary and difficult to perform the courts would be bound to see whether the language employed is not susceptible of a more reasonable construction. Undoubtedly there are many cases in the multitude of statutes where the command is so imperative and unconditional that there is no escape from an exact and literal observance. The industry of counsel has accumulated a considerable number of them in his brief. In such cases if the statute is within the power of the Legislature, there is, as the phrase goes, 'no' room for construction,' and the business of the Court is simply to administer the law as it is written. But this in no wise relieves the Court

from the duty of construing statutes which are not of that character, but are subject to the amelioration which the common law affords by its rules of construction. But with regard to this statute, on turning back from the consideration of the consequences to the language employed, we find nothing which in terms imposes such an obligation. It is said to be implied; and the singular result is that instead of shading down the express language of an act so that it shall have an effect which we cannot suppose to have been intended by the Legislature, we should by implication infer an intent which, if seemingly expressed, we should be bound, if fairly possible, to suppose did not exist. Then, again, the statute is penal. The facts which would be necessary to maintain a criminal prosecution are the same as those which would support a private action. The only difference would be in the greater certainty with which the facts should be proven. And in the construction of such statutes the Court is not justified in extending their operation beyond the plain meaning of the language used into regions of doubt and uncertain implications.

In this case we do not think it could be held as matter of law that the railroad company was guilty of a violation of the statute. In view of the evidence given at the trial, it was a question for the jury to determine as one of fact whether the railroad company should, if it have used reasonable diligence, have put the coupling in repair before the accident happened."

LURTON, J. (Rec. p. 83):

"I entirely concur in the conclusion of the Court and the interpretation given to the Car

Coupler act, but I cannot agree that this car was so clearly 'in use' contrary to the provisions of that act, as herein interpreted as to take that question from the jury."

RICHARDS, J. (dissenting) (Rec. p. 84):

"The car which caused the injury had a defective coupler. It would not couple automatically. As a result, the plaintiff below, under orders, went between it and the car it was to be coupled to, and tried to force a coupling by using his foot. In consequence, his foot was caught in the impact of the cars and seriously injured. In the opinion of the majority, the question is discussed whether the car was being used in interstate traffic, and it was held by one of the judges, a view in which I concur, that the testimony showed the car was being so used. That question being so determined, it seems to me that, under the facts as shown by the record, the Court was right in charging the jury as it did.

After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service, or

that the company had sent for the required appliance, and would repair the car when it should be received.

Certainly no ground is suggested why the employe, to protect whose life and limb this act was passed, should be deprived of its benefit in a case like the present, where he has already suffered the very injury which a compliance with it would have prevented.

This is a case peculiarly within the provisions of the act. A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked 'in bad order,' and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn, but it was not, and the company kept on moving it about in connection with other cars, and finally ordered the injured employe to couple it to another car. This he tried to do, with the natural result, and he has been crippled for life. The case amply justifies the verdict, and the judgment should be affirmed."

Thereafter on the 3d day of April, 1908, a petition for rehearing was filed in said cause, which was denied on the 16th day of May, A. D. 1908.

Rec. pp. 85-86 et seq.

Thereafter on, to-wit, the 18th day of May, A. D. 1908, this Honorable Court, speaking through Mr. Associate Justice Moody, delivered and filed its opinion in the matter of the case of the St. Louis, Iron Mountain & Southern Railway Company v. May Taylor, Administratrix (210 U. S. 281), wherein, after referring to the provisions of the act of Congress hereinbefore refered to and quoted, it was said:

"In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry. v. Delk*, 158 Fed. Rep. 931), we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employe reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibition of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the

law as it is writen, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employe and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and

to seek some unnatural interpretation of common words."

Thereafter on, to-wit, the 20th day of May, 1908, the term of said Circuit Court of Appeals for the Sixth Circuit, at which the judgment against the plaintiff here complained of was rendered, being still open, plaintiff filed a further petition for a rehearing of this cause, which petition was specifically based upon so much of the opinion of this Honorable Court rendered in the said case of the St. Louis, Iron Mountain & Southern Railway Company v. Taylor, administratrix, as is above set forth, which further petition for rehearing was formally denied on the 12th day of June, 1908, Circuit Judges Lurton and Severens concurring in the order of denial, and Judge Richards dissenting therefrom in the following language (Rec. pp. 93, 96):

"Although no opinion has been handed down upon the denial of the motion, I think for certain reasons I ought to state the grounds I dissent from it. This case was decided March 3, 1908, and I dissented then, stating my grounds. Subsequently, on May 18, 1908, the Supreme Court of the United States decided the case of St. Louis, Iron Mountain & Southern Ry. v. Taylor, Admx., 28 Sup. Ct. 616, 52 L. Ed., Mr. Justice Moody delivering the opinion. In the course of the opinion it became necessary for the Court to express its view of the operation and obligation of the safety appliance law, and it stated that, in enacting the law:

'The obvious purpose of the Legislature was to supplant the qualified duty of the com-

mon law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body.'

This was the view taken by the Court below, and I could not do other than dissent from this Court reversing the judgment because of action based on it. I dissent now for the purpose of pointing out that while the case has been sent back to grant a new trial to be conducted in accordance with the contrary view taken by this Court of the act, seemingly such view is inconsistent with the one announced since by the Supreme Court."

A petition for certiorari was prayed by the plaintiff from the judgment of the Circuit Court of Appeals and the same having been allowed, the cause now stands in this Court for final review.

ASSIGNMENTS OF ERROR.

Now comes E. M. Delk, the plaintiff in error, and respectfully submits that in the record and proceedings, and in the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, in this cause, reversing with costs the judgment of the Circuit Court of the United States for the Western District of Tennessee, and in the further judgment of the said Circuit Court of Appeals, denying the petitions for rehearing filed therein by the plaintiff in error, there is manifest error, in this, that the judgment of the said United States Circuit Court for the Western District of Tennessee was correct, and without reversible error.

The said Circuit Court of Appeals, in said judgments and in the opinion filed therewith, erred:

I.

Improper construction of the safety appliance act of Congress of March 2, 1893, and amendments thereto.

Section 2 of said act provides that—

> "On and after the first of January, 1898, it shall be unlawful for any such common carrier to hold, permit to be held or used on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of a man going between the ends of the cars."

Section 8 provides that—

> "Any employe of an interstate common car-

rier who may be injured by any locomotive, car or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train has been brought to his knowledge."

The trial judge charged the jury as follows:

"In this case there is no question raised, so far as I have heard, as to the fact that this defendant company is a railroad engaged in interstate commerce, hauling interstate traffic. There is a question made as to whether or not this car that had the alleged crippled coupler was a car being used in hauling interstate commerce within the meaning of this act. I think from the proof, gentlemen of the jury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case. Now, the fact that this man wen tbetween the cars to couple them, although he knew that the coupler was broken, would not of itself prevent him from recovering in this case, if he was hurt while in there attempting to couple the cars, but I submit to you the proposition whether or not the manner in which he attempted to couple the cars, was of itself negligence on his part and whether that negligence was the proximate cause of his injury." (Rec. pp. 57-58.)

The plaintiff in error contends that this charge is correct so far as the defendant is concerned.

The Circuit Court of Appeals, in its opinion, says:

> "On the other hand, the railroad company contends that it had complied with its duty if it had equipped the car with the prescribed coupling apparatus, and had used due diligence in endeavoring to keep it in good order. (Rec. p. 78.) * * * It is reasonable and just to require that the carrier should exercise a high degree of care to keep the couplings in proper condition. But it seems unjust and unreasonable to say that having fulfilled its utmost duty in this regard, it should be held responsible for conditions which may occur without its fault. * * *
>
> In this case we do not think it could be held as matter of law that the railroad company was guilty of a violation of the statute. In view of the evidence given at the trial, it was a question for the jury to determine as one of fact, whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened." (Rec. pp. 81-82.)

For the plaintiff in error, it is insisted that the Circuit Court of Appeals erred in this opinion, and the trial judge was correct in holding that if the defendant in point of fact used a car which did not comply with the standard, it violated the plain provision of the law and there arose from the violation the liability to make compensation to the plaintiff as found by the jury.

II.

No exception was reserved to the charge of the trial court for failure to charge as to effect of dili-

gence in keeping the coupler in repair, and no instruction as to defendant's theory in this respect was requested.

The Circuit Court of Appeals, therefore, assuming their view of the safety appliance act to be correct, erred in reversing the judgment of the trial court, because that court was not put in error on the trial by proper objection and exception duly reserved.

III.

Undisputed testimony, no diligence shown in inspecting and remedying defective coupler.

Were the Court of Appeals correct in their writing into the safety appliance act a modification not therein appearing, that if diligence be used by the railroad company in inspecting and remedying defects, no recovery can be had, yet their action in reversing the case at bar was erroneous because on the trial it affirmatively appeared that the defendant exercised no diligence in inspecting or in remedying the defective condition of the coupler.

IV.

Foreman and vice-principal with full knowledge of the defective condition of the coupling personally superintended and directed the coupling to be made.

This state of facts made the defendant liable, no matter what had been its diligence prior thereto with reference to the coupler.

The reversal of the judgment below for failure to submit this question of diligence to the jury was therefore error.

BRIEF.

First Assignment of Error.

This assignment raises sharply the two views as to the application of the safety appliance act:

The view of the trial judge, and, we submit, of this Court, that the act marks a distinct departure from the common law rules with reference to the liability of the master to the servant, is complete in itself, absolute in its terms, requiring the safety appliance whenever the car is being moved, and in effect declaring the master liable whenever the servant is injured because of the use of a car contrary to the act.

This construction avoids all casuistry, gives full effect to the humane purpose of the act, and confines the courts within their constitutional limitations of construing, not enacting or modifying, statutes.

The other construction, that adopted by the Circuit Court of Appeals, refusing to recognize the purpose of the statute to substitute for common law duties statutory obligations, seeks to engraft exceptions and modifications in the interest of the master, which, if sound, must logically be extended until the act has been rendered nugatory in the vast majority of instances where personal injury has resulted from the disregard of the plain language of the act. This latter construction has been characterized by this Court as "arrived at by an inadmissible narrowness of construction."

These two views are nowhere better expressed than

in the opinion of the majority of the Circuit Court of Appeals in the case at bar, and in the dissenting opinion of Judge Richards, and in the opinion of this Court in Railroad v. Taylor, 210 U. S. 281. Excerpts from these opinions are found in the record, page 81 et seq. and page 93 et seq.

In view of these decisions, it would seem unnecessary to analyze or differentiate the many cases preceding these decisions in the Federal and State courts construing the safety appliance act.

This Court, in Railroad v. Taylor, *supra*, seems to expressly condemn the decision in the case at bar.

Some of the cases preceding the Taylor case in which the view was taken that the purpose of the statute was to make a railroad company liable unconditionally for its violation, are:

Johnson v. R. R. Co., 196 U. S. 19.
Southern R. R. Co. v. Carson, 194 U. S. 136.
Schlemmer v. Buffalo R. R. Co., 205 U. S. 11.
U. S. v. Atlantic Coast Line R. R. Co., 153 Fed. 918.
U. S. v. Great Northern R. R. Co., 150 Fed. 229.
U. S. v. So. Ry. Co., 135 Fed. 122.
R. R. v. Voelker, 129 Fed. 522.

Since the opinion was rendered in R. R. v. Taylor by this Court, the views announced by this Court have been followed and applied under varying circumstances in—

U. S. v. R. R., 170 Fed. 1014.
R. R. v. U. S., 170 Fed. 556.
U. S. v. R. R., 173 Fed. 684.

R. R. v. U. S., 168 Fed. 1.
R. R. v. U. S., 168 Fed. 236.
R. R. v. U. S., 172 Fed. 864.
R. R. v. U. S., 168 Fed. 175.
R. R. v. King, 163 Fed. 372.
Johnson v. Grt. N. R. R., 178 Fed. 643.

In Railroad v. United States, 168 Fed. Rep. 175, Circuit Judge Prichard, delivering the opinion of the Court of Appeals for the Fourth Circuit, uses this pertinent language, which we quote in closing this statement, to-wit:

> "The contention that this statute works a hardship applies with equal force to any statute which undertakes to control the affairs of individuals or corporations in this way; but, in the light of past experience, we are inclined to think that this is the only method by which dangers incident to this kind of employment can be minimized. When we contemplate the vast number of accidents resulting from the operation of railroad trains not properly equipped with safety appliances, we are forced to admit the wisdom and fairness of legislation of this kind. It has been the policy of our lawmakers, both state and national, to grant railroad and other public corporations certain privileges not enjoyed by private individuals; and while this is a wise policy and has met with general approval, it is likewise proper that due regard shall be had for the rights of those employed by such corporations in performing duties that are necessarily dangerous in their character, and it cannot be said to be an unreasonable provision to require railroad companies enjoying privileges thus conferred upon them to manage and oper-

ate their engines and cars so as to minimize the risks incident to travel and employment."

In U. S. v. R. R., 110 Fed. 542, which arose in the Sixth Circuit, the Court admits that its decision in the Delk case was wrong, but draws a distinction between penalty suits and suits for personal injury. They say:

> "The Court is not at this time made up of the same members as it was when the Delk case was decided, but all are agreed that the decision was right as to a defect occurring during transit, and that so applied we should abide by it unless it shall be overruled by the Supreme Court. Still, if it should be held that our decision in the Delk case was wrong, it does not necessarily follow that in this suit for a penalty the Court below was also wrong in giving the construction complained of."

In Wabash R. R. v. U. S., 172 Fed. 864, the Court said:

> "The second question is raised by the following instruction to the jury, to which exception das duly entered:
>
> 'The testimony of the defendant's witnesses was admitted here as to the inspection of those cars, for the purpose of tending to show as far as in your judgment it does tend to show, that the defendant's cars were in good order. The mere fact that the defendant had used diligence or care to keep those cars in a reasonably safe condition is not a question before you. That is no defense to this suit. The statute is commanding, and requires the defendant at its peril to keep these couplers in

such condition, so that the men whose business it is to couple them will not be required to go between the cars to do it; and if you believe from all the evidence in this case that they were so out of order that they could not be coupled without men going between the cars to do the coupling, then the defendant would be guilty under this declaration, and you will so find,'

—supported by evidence tending to show that the plaintiff in error had used due care to keep the cars in a reasonably safe condition.

Since this case was brought here and the briefs filed, this question has been disposed of against the contentions of the plaintiff in error in the case of St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, Administratrix, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061."

The limitation on the power of the courts to modify the statute is well expressed in United States v. Col. & N. W. R. R., 137 Fed. 321:

"By so much the more is it true that where the lawmaking body has made exceptions to the general terms of an act, as in this instance, the presumption is that it intended to make no more. Again, if Congress intended to make this exception it was a secret intention which the safety appliance act not only failed to express, but which their terms expressly negatived. It is the intention expressed, or necessarily implied, in the law, and that alone, to which courts may lawfully give effect. They may not assume or presume purposes and intentions that are neither expressed nor implied, and then construe into the law the provisions to accomplish these assumed intentions. A secret intention of the

lawmaking body cannot be legally interpreted into a statute which is plain and unambiguous, and which does not express or imply it. U. S. v. Wiltberger, 5 Wheat. 76; Bennett v. Worthington, 24 Ark. 487, 494; Tynan v. Walker, 35 Cal. 634; Smith v. State, 66 Md. 215, 7 Atl. 49; Railway Co. v. Bagley, 60 Kans. 424."

In Chic., M. & St. P. Ry. v. U. S., 165 Fed. 423, the Court said:

"The duty of the defendant under the statute is an absolute one, and is not discharged by the exercise of reasonable care. The case is controlled by the principles announced in St. L., I. M. & S. R. R. v. Taylor, 210 U. S. 281; U. S. v. A., T. & S. F. Ry., 163 Fed. 517; U. S. v. D. & R. G. R. R., 163 Fed. 519."

In C., B. & Q. R. R. v. U. S., 170 Fed. 556, the Court said:

"The sole contention is, that notwithstanding this concession, inasmuch as it appears by the proof that the defendant did not know its cars were out of repair and had no actual intention at the time to violate the law, but on the contrary had exercised reasonable care to keep them in repair by the usual inspections, it is not liable in this action. Learned counsel concede what is undoubtedly true, that sustaining their contention involves a reversal of the doctrine unanimously declared by this Court in United States v. A., T. & S. F. Ry. Co., 163 Fed. 517, and in United States v. Denver & Rio Grande R. R. Co., 163 Fed. 519, and a disregard of what they call the dictum of the Supreme Court in St. Louis & Iron Mtn. Railway Co. v. Taylor, 210 U. S. 281, and they accordingly invite us to enter

upon a reconsideration of the questions so decided.

It was held by us, and in our opinion it was necessarily held by the Supreme Court in the Taylor case, that the duty of railroads under the statute in question is an absolute duty and not one which is discharged by the exercise of reasonable care or diligence. Since these cases were decided this Court, in the case of C., M. & St. P. Ry. Co. v. United States, 165 Fed. 423, has again approved of their doctrine, and the Circuit Court of Appeals for the Fourth Circuit, in the case of Atlantic Coast Line R. R. Co. v. United States, decided March 1, 1909, and not yet reported, in considering this question, made a review of pertinent authorities, and particularly of the cases of this Court, as well as of the Taylor case, and in an exhaustive opinon reached the same conclusion that we did."

In United States v. So. Pac. R. R. Co., 169 Fed. 407, the Court said:

"Since the decision of the Supreme Court of the case of St. Louis & Iron Mountain Ry. Co. v. Taylor, 210 U. S. 281, we have uniformly held that the safety appliance act imposed an absolute duty upon carriers of interstate commerce to equip and maintain their engines and cars used in or in connection with that service in the way prescribed by that law, and that the performance of this duty is not excused by the exercise of reasonable care."

Act of Congress of 1910 Amendatory of the Safety Appliance Acts.

The rule announced in *R. R. v. Taylor* by this Court was denounced as being harsh, unjust, and

not contemplated by Congress. Evidently it seemed to Congress harsh insofar as it rendered the railroad company liable to a statutory penalty even when the railroad showed the exercise of due care. It seemed just, humane and in accord with the purpose of the act, when applied to the injured employe. The result of these views by Congress brought about the enactment of the amendment of 1910, which forms a striking example of a legislative body recognizing the soundness of the judicial construction of an act and affirming the correctness of the judicial view in an amendment to the original act.

The act referred to is as follows:

> "Section 4. That any common carrier subject to this act, using, hauling, or permitting to be used or hauled on its line, any cars subject to the requirements of this act, not equipped as provided in this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in Section 6 of the Act of March 2, 1893, as amended April 1, 1896; provided that where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired without liability for the penalties imposed by Section 4 of this act or Section 6 of the Act of March 2, 1893, as amended by

the Act of April 1, 1896, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point, and such movement or hauling of such car shall be at the sole risk of the carrier; and, nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure, or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of draw-bars in revenue trains, or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight.

Section 5. That, except that within the limits specified in the preceding section of this act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful. Nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney, from any of the provisions, powers, duties, liabilities or requirements of said Act of March 2, 1893, as amended by the Acts of April 1, 1896, and March 2, 1903; and except, as aforesaid, all of the provisions, powers, duties, requirements and liabilities of said Act of March 2, 1893, as amended by the Acts of April 1, 1896, and March 2, 1903, shall apply to this act."

In the report of the Senate Committee on Interstate Commerce recommending the enactment of this act this occurs (see Senate report, 61st Congress, second session, report No. 250):

> "The amendment proposed permitting movement without penalty of a defective car to a repair shop, when necessary, is deemed advisable, as the Supreme Court of the United States, in the Taylor case, held that the present act, which this act amends and supplements, is absolute, and there is therefore great doubt as to the right of a railroad company to move even a defective car to a point of repair without incurring the penalties of the act. It is with no intent of relieving the carriers from the construction put upon the act by the courts in personal injury suits so far as liability for injury to their employes is concerned, that this amendment is recommended. Such necessary movement is still to be at the risk of the carrier, and the absolute character of the act in its remedial features as determined in the Taylor case is intended to be preserved and maintained under this proposed amendment.
>
> The carriers have urged this amendment to relieve them from penalties which they claim are possible under existing law, if a defective car is hauled to a repair shop, although such movement is one which must necessarily be made for the purpose of placing such car in repair. Permission to make such movement has been deemed advisable, but in relieving the carrier from penalties when such a movement of a defective car is made it is certainly not just that train men who are endangered by such movement should be subjected to such peril without a remedy. As

there is danger in the movement of such defective cars, and as train men are obliged to handle them without any real option on their part so to do, it is but just and equitable that the risk attendant upon such movement where death or injury to train men results should be borne by the carrier and not in any degree assumed by the train men.

It is one of the perils of the operation of the railroad for which train men are not at all responsible. As it is practically obligatory upon the train men to incur such dangers, there should be no impairment of any right of such train men by reason of the performance of such dangerous duty. As the law stands today prohibition of the movement of such defective car seems to be absolute, and the rights of the train men in operating such a car have been declared to be absolute. In removing the penalty for the hauling of such a defective car, when necessary, to a repair shop, it is intended by the terms of the proviso to preserve intact and unimpaired all the rights now existing by law to the train man, or his representative, to recover in case of injury or death resulting from the peril of participating in the movement of such a defective car.

It is but just that the risk of working about, and the movement of, defective equipment should be borne by the carriers. This amendment does not permit the movement of damaged cars in connection with those commercially used, and in every other respect the interests of the employes have been fully safeguarded."

Second Assignment of Error.

No exception was reserved to the charge of the trial Court for failure to charge as to effect of diligence in keeping the coupler in repair, and no instruction as to defendant's theory in this respect was requested.

All that was said in the charge by the Court upon this subject is as follows:

> "There is a question made as to whether or not this car that had the alleged crippled coupler was a car being used in hauling interstate commerce within the meaning of this act. I think from the proof, gentlemen of the jury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident, and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case." (Tr. p. 57.)

The Court then proceeded to tell the jury that if in the attempt to make the coupling the plaintiff was injured by reason of his own contributory negligence he could not recover, but if his conduct was free from negligence he could recover. A consideration of that part of the charge above quoted shows the trial judge had in mind the question as to whether or not the putting of the car with the defective coupler on the side track so withdrew it from transportation as to take it out of the provisions of the safety appliance act. The trial judge did not have in his mind the question of whether or not the cmpany was exercising due diligence toward repairing the car, or as

to whether or not diligence in discovering and remedying a defective appliance would be an excuse, in the event of injury. All that was said in this section of the charge was that the act applied. This was not error, for the majority of the Court have held that the act did apply. The trial judge then proceeded to say, first, that the act applies, and "so the only proposition left for you to determine is whether or not if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case." Now, there can be no doubt that this statement of the trial judge was correct. The only question in this case is, is the company liable under the facts of the case?

The Court then proceeded to charge upon the question of contributory negligence; the Court did not proceed to charge that if the jury should find that the defendant company was in the exercise of due diligence and care in discovering the defects and in undertaking to repair same, and notwithstanding such diligence upon the part of the company the plaintiff was injured, they should then find for the defendant. The charge is absolutely silent upon this proposition.

Now, let us see what was done by the attorney for the defendant to direct the mind of the Court to this omission in the charge, as well as the mind of the attorney for the plaintiff. It is quite manifest to this Court that had the proper exception been reserved the plaintiff's attorney would have seen to it that the charge was modified to meet the views of the

attorney for the defendant if the Court had been in doubt. (Note the comment of plaintiff's attorney at the foot of page 60 of the record.) Both the Court and the plaintiff were entitled to have this question brought to their attention, before error can be predicated upon it. The attorney for the defendant presented no request embodying the views announced by the majority of the Circuit Court of Appeals, and there is no error predicated because of the refusal of an instruction to that effect. As a matter of fact, the theory on which the Circuit Court of appeals has proceeded in reversing the case was one that was not in the mind of the attorney for the defendant below, and was not by him presented to the trial judge. We need not cite to this Court authority to the point that if the trial judge's charge is meager and insufficient that alone cannot be made ground for reversal. The duty is then imposed upon the attorney whose case is not fully charged, to present special requests embodying his theory of the law.

Let us now consider the language of the exception:

> "In the first place, we except to the ruling of your Honor in declining to direct a verdict for the defendant and that exception will be founded distinctly upon the ground that the proof shows as a matter of law contributory negligence on the part of the plaintiff and also that the statute which your Honor read to the jury, Sections 2 and 8 of the safety appliance act, did not apply. We except to that part of your Honor's charge which instructs the jury that under this evidence the law does apply; your Honor expressly said that to them, and we except to that."

Compare the exception with the charge of the Court. You will see that the exception was to the point, that the Court erred in charging that the car was engaged in interstate commerce at the time of the accident. This was the whole theory of the defendant's attorney on the trial below. He thought that the car had been withdrawn from interstate commerce, by being placed on the team track. There is not in the exception a suggestion that the charge was insufficient in that it did not charge the jury that while the act applied, yet if they found from the evidence that the company was in the exercise of due care and diligence in discovering the defect and in endeavoring to repair it, they should find for the defendant. We beg that your Honors read this exception and see if we are not right on this proposition. Must not the exception be plain and direct so as to leave no doubt as to what the exception is directed to? The defendant's counsel in making the exception expressly stated (Rec. p. 59) "that exception will be founded distinctly upon the ground that the proof shows as a matter of law contributory negligence on the part of the plaintiff, and also that the statute which your Honor read to the jury, Sections 2 and 8 of the safety appliance act, did not apply." The opinion of the majority of the Circuit Court of Appeals says that the statute does apply and that the car was engaged in interstate commerce. This exception, therefore, should have been overruled.

If this exception is sustained because of the omission to charge as to the effect of diligence, the spirit if not the letter of Rule 10, Circuit Court of Appeals,

and Rule 4, Supreme Court, is violated, for manifestly the plaintiff in error did not distinctly state the proposition of law which he now seeks to rely on.

2d Edition, Foster's Federal Practice 377.
Taylor on Jurisdiction and Procedure in Supreme Court 674.

The specific language of the charge is not excepted to, but in effect the theory of the charge is sought to be excepted to.

The case at bar falls within—

Bock v. Gassert, 149 U. S., p. 23.
Anthony v. the L. & N. R. R., 132 U. S. 172.
Nelson v. Flint, 166 U. S. 276.
Fidelity & Deposit Co. v. Courtney, 186 U. S. 342.
Bud v. U. S., 187 U. S. 118.

The failure of the Court to charge on a material question of law is not the subject of an exception when no request for such charge was made on the trial.

Texas & Pac. Ry. v. Volk, 151 U. S., p. 73.

In this case the trial judge did not charge on contributory negligence. The Court said: "The omission of the Court to instruct the jury on the subject of contributory negligence is not open to exception, because the bill of exceptions does not show that the defendant requested any instruction upon that subject."

In Isaacs v. U. S., 159 U. S. 491, the Court sustains this principle in a capital case.

"The next assignment is to the charge 'that

the corpus delicti could be established by circumstantial testimony; without that this circumstantial evidence should be such as creates cogent irresistible grounds of presumption.' Without any request on the part of the defendant to add the qualification suggested, there was no error in the charge actually given. It is no ground for reversal that the Court omits to give instructions where they were not requested by the defendant! It is sufficient that the Court gives no erroneous instructions."

This case is very much like the one at bar, where the Court charged that the statute applied, but did not charge the qualification as to the effect of diligence.

In Goldsby v. the U. S., 160 U. S., page 77, where the Court failed to charge as to the weight in law to be attached to testimony introduced to establish an alibi, no such request having been made, it was held the assignment could not be considered.

In Tex. & Pac. Ry. Co. v. Cody, 166 U. S. 607, the charge complained of was that the trial court told the jury that if they found for the plaintiff they would find for him in any sum not exceeding $10,000. The Court said: "Nor was there error in respect of the question of damages. What the trial judge said in that respect, taken together, was not incorrect, and if the railway company had desired particular instructions in reference to the measure of damages it should have requested them, which it did not do."

To the same effect is Backus v. Fort. St. Union Depot, 169 U. S. 575; Lazarus v. Phelps, 156 U. S.

202; Humes v. U. S., 170 U. S. 209; Williams v. Simons, 70 Fed. 44; Eastern Oregon Land Co. v. Cole, 92 Fed. 953.

As a matter of fact, on the trial below it was never contended by the defendant that it had exercised any degree of care with reference to the coupler. The defendant's theory was, first, the car by being placed on the team track was withdrawn from interstate commerce and from the operation of the safety appliance act; second, in any event the plaintiff could not recover because of his contributory negligence. To these two propositions alone the defendant's proof, instruction and exception were directed.

Third Assignment of Error.

The evidence showed want of diligence and care on the part of the railroad company.

The opinion says "in view of the evidence given at the trial it was a question for the jury to determine as one of fact whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened." It seems the Circuit Court of Appeals in passing upon the wider question of the construction of the safety appliance act wholly failed to consider the facts which affirmatively showed no diligence upon the part of the company.

> The mechanism required by statute to be in good order was in bad order, and from this bad order the accident resulted. In such case, the burden of proof was on the master to show that in permitting the condition of bad order to arise,

or continue, he was without negligence, or was in the exercise of ordinary care. Even without the statute, where an appliance is furnished the servant, which becomes by use out of repair and dangerous, and this condition is a discoverable one, the burden is on the master to show that he exercised ordinary care in inspecting the appliance and discovering the defect, and that he was not lacking in ordinary care in not repairing the appliance before harm was done.

It is not incumbent on the servant at common law, after showing a lack of care in furnishing a safe appliance, or a safe place to work, to go further and show lack of care in the master in discovering the unsafe condition, when such condition would be disclosed by an inspection.

No attempt was made by the defendant to show diligence in discovering the defective condition of the coupler, or in repairing it, therefore the charge of the Court on this point was correct.

But we go further, and invite the attention of the Court to that evidence, which, without contradiction, shows the absence of ordinary care by the master.

Negligence as to Inspection.

(1) The defective car was defendant's car, St. L. & S. F., No. 21696, and was loaded with lumber at Giles, Arkansas, where it began its ill-fated journey at some undisclosed date. No inspection is shown to have been made at Giles, when the car arrived there, while there or on pulling out from there.

(2) The car arrived in Memphis on September 28, 1906, at 4:30 p. m. No inspection is then shown to have been made. It remained in the

yard until October 2, as disclosed by the record introduced by Mr. McGregor (the keeper of same), and such records showed the absence of any inspection.

(3) Delivered to the Belt Line (Union Railway Co.) or rather tendered to them on October 2, and was refused. The car was then returned to the yard at 7:30 a. m., on October 3, for a safety appliance. (McGregor's evidence, page 23, and Holmes' evidence, pages 51 and 52.)

The *Union Railway Company discovered the defective condition* of the car, when offered to it, and refused to receive or handle the car in its condition.

In the absence of evidence from the defendant, this is affirmative and controlling evidence, that an inspection by the defendant would have disclosed the defective coupler, and that the defendant was lacking in ordinary care in not having discovered the defective condition sooner.

B. Negligence as to Repairing.

(1) From October 3d at 7:30 a. m., when this car got back in the yard and on this team track until the hour after accident on October 4th at about 11:00 a. m., this car remained on a much used team track on which there was much switching and coupling, and was not repaired. The repair could have been made in ten minutes.

Holmes, 53.

(2) The repair should have been made at once. This one car repairer says he repairs from nine to ten a day, or may be more in the busy season.

P. 56.

To let a car go thirty hours without repairing it would therefore be unusual.

(3) And Holmes would have repaired the car on the evening of October 3d, but he had no material handy.

'Not that evening, I didn't have the material the evening the car returned.' P. 52.

But he should have had the material. The negligent absence of the usual and customary supplies caused an unreasonable and negligent delay, which ultimately resulted in the accident.

The car could have been repaired in the neighborhood of three hundred times, from the time the defect was brought to the company's attention until it was actually repaired. And in constant use all the while.

The testimony thus affirmatively shows that it was the defendant who was negligent in not repairing the coupler. *There is no reason assigned why it didn't send for the repair material on the day of the 3d, as the car reached there early in the morning.*

Thus upon the question of the testimony, it is purely a moot question, whether the Court shall write this modification into the statute; if it were there by legislative enactment, the defendant, on the facts in this case, would be liable for a violation of the statute, for the proof fails to show that the defendant exercised ordinary care in discovering or repairing the defective coupler.

Negligent Continued Use of the Car After Notice of Defect.

Defendant based its entire contention of "due diligence" on the assumption that it used reasonable diligence to ascertain the defect in the car and that

it "retired the car from the service and isolated it for repair immediately upon ascertaining the defect." The record shows no such thing.

Before going into what the proof does really show, it might be well to determine upon whom the burden rests of showing that the car was not being "used" in the sense intended to constitute a violation of the act.

Did the defendant emancipate itself from the act by simply tagging this car *"bad order"* and placing it on a side track with other interstate cars, then in active use?

Congress evidently took into consideration, the inconveniences to railroad companies in providing this equipment and in keeping the same in repair, yet by positive enactment it manifestly considered the safety of the brakeman and employes charged with the duty of coupling and uncoupling cars, of paramount importance; and having made no exception in terms, the natural conclusion is, that the act was intended to apply in all cases where cars were being used in moving interstate traffic.

In the case of United States v. Colorado & N. W. R. R. Co., decided by the U. S. C. C. A. Eighth Circuit on the 25th of Nov., 1907, and not yet reported; the Court say regarding exceptions to this act:

> "Where Congress makes no exceptions from the clear and certain declarations of a statute, there is ordinarily a presumption that it intended to make none. A secret intention of a law making body may not be lawfully assumed

by the courts and interpreted into a statute whose language is plain and unambiguous, and does not express or necessarily imply it. Courts can only give effect to the intentions of the law-making body expressed in the statute or necessarily implied."

In Schlemmer v. The R. R. Co. (supra) the defendant claimed an exception to the absolutism of the statute and the Court laid down the following rule:

> " * * * if the defendant wishes to rely upon this proviso the burden was upon it to bring itself clearly within the exception. * * *
>
> The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exceptions must establish it. Ryan v. Carter, 93 U. S. 78; U. S. v. Dixon, 15 Peters 141. *The rule applied to construction is applied equally to the burden of proof in a case like this.* U. S. v. Cook, 16 Wallace 168; Commonwealth v. Hart, 11 Cushing 130."

The general mandatory character of the provision, and prohibitions of the Act of 1893, which contains no exception whatever, in so far as the requirements as to using couplers which will couple automatically by impact, is concerned, are strengthened and made more "strenuous," if that were possible, by the terms of the mandatory statute of March 2, 1903 (32 Stats. 943), which declares that the provisions and requirements of the Act of March 2, 1903, "shall be held to apply * * ** *in all cases*" and *"to all trains, cars, etc.,"* used on any railroad engaged in inter-

state commerce. In substituting the word "used" for the words "haul and use" the amendment was broadened. U. S. v. R. R. Co., 149 Fed. 486.

The duty of the defendant is not only to equip the cars, but also to keep them in proper condition so that they could at all times be coupled and uncoupled without the necessity of some one going between the cars.

No exception in favor of automatic couplers which have become defective or inoperative through use, and are set aside for repair, is to be gleaned from the terms of the statute. If the defendant railway company relies upon any exception or exemption in its favor to be gathered from general law or subsequent statute, it would seem, on the strength of the decisions above cited, to have been incumbent upon it not only to have asserted the exception, but to have proved itself within it.

The plaintiff, having asserted the duty resting upon the defendant under the statute, and having proven its failure to perform such duty, by showing that its car, though equipped with automatic couplers, would not couple automatically, because of its defective condition, and having asserted his own immunity under the statute from "assumption of risk" which might otherwise have overthrown his claim, clearly makes such a prima facie case as entitles him to recover unless the defendant railway company in the course of its own defense showed that under the circumstances the prohibition of the statute and its denouncements had no application to it.

The mere presence of the defective appliance gave rise to the presumption of negligence on the part of the party subject to the imposed duty; and so far made out a prima facie case, for plaintiff, as to put the defendant to its proof and require it to show that it had diligently and in good faith endeavored to fulfill the duty and obligation so cast upon it, or that the defect in the appliance had nothing to do with the injury.

So if it be conceded that the conditions presented in the case at bar, constitute by implication an exception (which we by no means do) and that the "care and diligence" exercised by the company, in looking for, and repairing defects, is a defense to the application of the act, the burden of showing it used the requisite diligence is clearly upon the defendant, who invokes it.

If diligence could be a defense it must undoubtedly be a very high degree of diligence.

But proceeding on the theory of ordinary diligence, defendant fell far short of doing its duty. Matters of inspection are peculiarly within the knowledge of the defendant. Yet, it fails to show *when* the car became crippled. It fails to show whether or not it was in good order when received *at Giles and transported to Memphis.* It may have been out of order for months. There is no proof that the car was even inspected by defendant at all. It was not inspected when it was brought to their yard the first time (57) *and it remained in the defendant's yard four days and was not inspected at any time* by defendant (22).

In U. S. v. R. R. Co., 149 Fed. 486, the Court says: * * * "If a defective car is received and no inspection is made the receiving company is liable for all injuries and damages that follow." * * *

It was in the power and alone in the knowledge of defendant, to show that the car was only recently broken, if that was a fact. But they fail to do it.

It was then sent to the Belt Line and then, and not until then, was the defect discovered, and, surprising to say, it was discovered *by the agent of another road* (52-23). It was then returned to the defendants to make the repairs. Instead of carrying the car to the hospital track at the shops, a short distance from the Belt Line, where bad cars were isolated and where they had the necessary equipments, with which to repair the car (25-52), and which could then have been easily and inexpensively done, the defendant took this condemned car over to its new yard where it knew there were few if any equipments for repairing cars and where repairs were only seldom made. What did defendant then do? Did it promptly repair the car? No, indeed! The defendant then simply *tagged the car "bad order"* and instead of isolating it or putting it with other cars of its ilk, or placing it where it would not have to be used; it placed this car on the "team track" and coupled it to eight other good order interstate cars, some of which were loaded and others empty and all of them being in transit. This team track was used to temporarily deposit cars in transit and was a part of the new yard, where was had the general making up and distribution of trains. Again,

the team track was on a curve which tended to make every coupling and uncoupling more difficult. Defendant contented itself with thus tagging this car "bad order" and *left it there all the day of October 3d, knowing that employes must of necessity go upon this track to move the cars;* to separate them (54); to put others on or to take cars off, at all hours during the day and night of October 3d and the morning of the 4th, and that this crippled car must be moved in order to move any of the others *and that it was a menace to the life and limb of every employe, that had to go upon this track during that time.* This is what defendant's counsel designate as "retiring(?) the car from service(?)." We submit that this was decidedly a "use" of the car under the Act and one of the very things the Act was intended to prevent. After the car had been thus steadily in use, all the day and night of October 3d, defendant's agent on the *morning of October 4th,* started a man *on foot* (52) to the hospital track at the shop, a distance of two and one-half miles, for a Gould lock with which to make the repair. Just why a modern railroad company in a city of street cars and rapid transit, telephones, etc., should select this primeval manner of transportation is not shown. Especially should this be shown when the employes were being imperiled by this crippled car every moment it was left on this team track, coupled to other loaded interstate cars. Neither is it shown why its inspector, who was also used as a car repairer, did not have these simple appliances on hand, inasmuch as he testified that he had nine or ten similar repairs to

make per day (56), and there were only two kinds of Gould couplers (57). The messenger arrived about 11 a. m. on the 4th, and the car was repaired. The car had then been used one day and one night and half of another day in its crippled condition after defendant had tagged it, and during the last half day of its use and *before the messenger returned,* plaintiff suffered his injury. And all this, when the car could have been repaired in ten minutes and it was so repaired in said time (53), before it was ever coupled, *after plaintiff received his irreparable hurt* (55).

We submit, therefore, that there was no diligence of any sort used by defendant at any time, either before or from the arrival and reception of the car in defendant's yard, from Giles, Ark., until plaintiff received his terribly injury. On the contrary, their conduct was so careless as to amount to gross negligence. And no view that can be taken could relieve it from liability.

In U. S. v. The Southern Ry. Co., 135 Fed. 122, it appeared that the company, instead of repairing cars simply put a "M. C. B." card on them as notice of the defect and sent them over another road. The Court in speaking of this said:

> "Here is such deliberate violation of the statute as to amount to open defiance."

If the defendant could abrogate the statute by simply putting a "bad order" tag on a car; changing the character of the use, and then placing it

where the employe must continue to couple and uncouple, the Act would be a rope of sand.

Defendant's counsel sought to leave the impression on the Circuit Court of Appeals that the car was immediately "retired from service" and was no longer being "used." Of course, it was not being hauled in a train between stations. But the switchman and other employes, for whose benefit the Act was passed, were still compelled to go in and couple and uncouple perhaps a great deal more than if it had been in a train on a journey. It was impossible to move any of the good order, interstate cars on this team track or place others on the track, without moving this crippled car. Moreover, the employes were in a sense lulled into security by the defendant placing the car with the other good order cars and were not so likely to see the "bad order" tag, which was defendant's only precaution. In fact, the proof shows that plaintiff did not see the tag. No doubt the engineer would have been more cautious in obeying the signals if he had known there was a "bad order" car in this line on the team track. It was, therefore, "retired from service" of one character, and put into service of another character, which exposed the employes to more danger, than the first character of service. It was "used" all the time from the moment the car was tagged "bad order" until plaintiff was injured and was being used in an interstate movement at the time of the injury. Opposing counsel seek to leave the impression that the car was being moved for the purpose of repair at the time of the injury, when, as a

matter of fact, the injury occurred a day and a half after the "bad order" tag had been put on, and the car had been coupled to this line of cars on the team track. And at the time of the injury, plaintiff was doing a necessary coupling of this car in order to get three cars out of the line to load for Mobile, Ala.

Opposing counsel said in their former brief:

> "What could it have done that it did not do? Was it prohibited by the Act of Congress from moving the car from its main track after discovering its defective condition? Was it required to hold the car upon its main track and thereby tie up the operation of the road, the transportation of the public and the United States mail?"

This is a rather ingenious method of leaving an entirely erroneous impression of the facts surrounding the accident, and of what the plaintiff complains.

To begin with, the proof shows, as before clearly stated, that defendant has two yards in Memphis; that it has a specially designed hospital track with all equipments for repair at the lower yard or shops, where nothing but bad order cars are kept and repaired; that the defendant never discovered the defect at all, but the car was refused by the Belt Line on account of the defect; that the defendant for no apparent reason but assumedly to suit its convenience, abandoned the plan of isolating this car on the regular hospital track where all the employes would have taken notice of its condition, and elected to take the car to this new yard, where repairs were seldom made and where the supply of material was

limited; it then tagged the car and coupled it to other good order cars on a team track which was on a curve and in constant use and there left it in use for about thirty hours before it did this light repair.

It had a perfect network of side tracks in this switch yard, upon any of which the car could have been isolated until repaired. No one insists that it should have remained on its main line. With this hospital track and the innumerable side tracks of every description in both yards, it is absurd to talk about plaintiff insisting that it should have "tied up transportation and the United States mail."

In reply to counsel's query as to "what it could have done that it did not do," we answer: It could have taken this car to the regular repair track, where it knew it would be isolated and where it knew the appliances were at hand with which to make the repairs. It was far easier and less expensive to take the car to the repairs than to bring the repairs to the car, in another yard. Or if it was compelled to leave the car in the new yard and send for the repairs, in the manner followed, it could have isolated the crippled car and retired it from *any and all sorts* of service until the repairs came. With its myriad tracks in this yard, this would have been just as easy as the course followed. It certainly *should not* have placed it on a side track in perpetual use and coupled it to other good order cars which were constantly on the move and difficult to couple because on a curve. In so doing, it permitted plaintiff to avoid Scylla only to encounter Charybdis.

In United States v. Northern Pac. R. R. Co., 144 Fed. 861, the Court said:

> "It makes but little difference, therefore, whether the car contained, at the time, any commodity being carried as freight or not, if the car was one being used in moving interstate traffic, not in the sense that *at the particular time it was going, loaded or partially so with a commodity being shipped from one State into another or others, but that it was being employed in a service that was moving interstate traffic.* Such is the construction given the law by Shiras, Judge, in Voelker v. the R. R. Co. (116 Fed. 867) and approved by Chief Justice Fuller in Johnson v. the R. R. (196 U. S. 1)."

This construction of the act was ratified by the Circuit Court of Appeals in the Voelker case (129 Fed., heretofore referred to) wherein the facts and entire case were on all fours with the case at bar. The car which injured Voelker was on a side track sometimes used as a repair track, like in the case at bar. The company had a regular repair track in that case, but declined to use it to isolate this car, and that was precisely the condition of affairs in the case at bar. At the time of the injury, the car was not being moved for the purpose of isolating it for repair. It was being used to couple other cars to, as in the case at bar.

Voelker was backed against and killed without any notice being given for the cars to come back, while in the case at bar the cars were backed upon plaintiff in a manner contrary to his signal and direction. The only difference between the two cases is, that

the "bad order" card had not been put on the car in Voelker's case, while in the case at bar, it *had* been put on. However, plaintiff did not see this card, as it was on the other side of the car, and so far as he was concerned the card was not on the car. The Circuit Court of Appeals says, 129 Fed. 522:

> "It is assigned as error that the Court, in effect, instructed the jury to disregard the defense of assumption of risk based upon the allegation in defendant's answer, that the track on which the coal car was standing was used 'to set out and handle thereon * * * cars having some defect in them and needing repairs as well as other cars, not defective,' and that this was known to Voelker, or could have been ascertained by him by the exercise of ordinary care. The allegation is not that this was a *hospital track, specially designed or used for isolating or holding cars in need of repair or for repairing them,* or that the car in question was being moved with a view to its isolation or repair.
>
> * * * * * *
>
> The evidence, without any substantial conflict, showed that this track was principally used in actively handling freight trains and freight cars; that incoming trains were received thereon and the cars distributed therefrom; that incoming trains *sometimes brought thereon cars in need of repair,* and in some instances such cars were temporarily transferred thereto from other tracks; *that there was in the yards of Dubuque a hospital track especially designed and used for isolating and holding cars in need of repair;* that the practice was to inspect the cars of incoming trains, and to mark those found in need

> of repair, commonly termed 'bad order' cars, in such manner as to indicate their condition, preparatory to their proper disposition, and as a warning to those handling them; and that at the time of the injury this car had not been marked or isolated as in bad order. There was no evidence that Voelker was engaged in moving the car as one in bad order, with a view to its isolation or repair. Of this evidence it is sufficient to say that, working under such circumstances with a car in use contrary to the congressional act does not, in the presence of Section 8, amount to an assumption of the risk arising therefrom, and the Court very properly instructed the jury to that effect."

The car in the case at bar was not being moved with a view to its isolation or repair. It was being moved for the purpose of getting these two empties from that track and was being coupled on the team track after separating the two empties from the cars on the team track, because the track was on a grade and it was necessary to couple and chock the cars. This track was actively used in handling freight trains and freight cars and incoming trains were received thereon and outgoing trains were made up and dispatched therefrom. (54.)

The company further contended in Voelker's case that the conduct of the engineer in backing against the cars was the cause of the accident and not the defective coupling. Judge Shiras said upon this point (116 Fed., p. 875):

> "The statutory requirement with respect to equipping cars with automatic couplers was en-

acted in order to protect the railway employes, as far as possible, from the risks incurred when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers, or because the company allowed them to get out of repair it is certainly not performing the duty and obligation imposed upon it by the statute, and is clearly, therefore, chargeable with negligence in thus using an improperly equipped car; and the company is bound to know that, if it called upon one of its *employes to omake a coupling with a coupler so defective and inoperative that it will not couple by impact*, and that, to make the coupling, the employe must subject himself to all the risks and dangers that inured in the old and dangerous link and pin method of coupling, it is subjecting such employe to the very risk and danger which it is the purpose of the statute to protect him against, so far as that is reasonably possible. Subjecting an employe to risk of life and limb by calling upon him to use appliances which have become defective and inoperative through the failure to use proper care on the part of the master is certainly negligence, which will become actionable if injury results therefrom to the employe; and liability therefore cannot be avoided by the plea that, if the company was thus guilty of actionable negligence in this particular it cannot be held responsible therefor, because it was guilty of *another act of negligence which aided in causing the accident. This accident happened because Voelker, in the performance of his duty, was called upon to place his person in a position where he might be caught*

between the cars he was expected to couple together. He was required to place himself in this dangerous position because of the negligent failure of the company to have upon the car a coupler in proper and operative condition, and certainly this negligent failure of the company was the proximate cause of the accident."

In United States v. Southern Pac. R. R. Co., 154 Fed. 897, the car was unloaded before it was repaired, because it rendered repairs more practicable. Wolverton, Judge, said:

> "After the cars were taken into the terminal yards it was necessary to uncouple them to set them out for unloading and to couple them again for transportation to the Southern Pac. Co. car shops, with possibly other couplings and uncouplings to be made. So that the danger to the brakeman continued until relieved by the proper repairs being made. I am constrained to the view, therefore, that this is just the danger that Congress intended to relieve against by the adoption of the act, and that it was what the defendant's duty required it to relieve against, by making the repair of the defects prior to taking the cars into the terminal company's yards."

In the case of Philadelphia and Reading Co. v. Winkler 4 Penn. Del. 387 (53 Atlant. 90), cited and approved by the Supreme Court in the Johnson case, the plaintiff was injured while coupling a car to the tender in one of defendant's yards. Though the car was equipped with an automatic coupler, it was not so equipped that the coupling could be made without the necessity of plaintiff going between the car and tender. *Moreover the car being moved was not one*

used in interstate commerce, but it was necessary to move it in order to reach other cars used in interstate traffic. The Court held these facts to constitute a case within the statute. One of the instructions given to the jury by the trial Court is a model of clearness and conciseness, as follows:

> "If the tender and car were then in use in moving local traffic only from point to point within the limits of the State, they would not be engaged in interstate commerce. If, however, the car being moved had come from a point out of the State with freight to be here delivered, it would be moving interstate commerce. This would be so even though the car to which the tender was being coupled was not the car used in interstate traffic, *if the removal of such car was a necessary step in getting at and moving said interstate car.*"

There are several other cases similar to the case at bar wherein the act is held to apply like:

U. S. v. America, etc., R. R. Co., 143 Fed. 360.
U. S. v. Chicago, etc., R. R. Co., 149 Fed. 486.

Fourth Assignment of Error.

Foreman and vice-principal, with full knowledge of the defective condition of the coupler, personally superintended and directed the coupling to be made.

Were it possible that the Court should find on the facts of this case that diligence in furnishing a safe appliance and in inspecting and repairing same was a good defense, if established, and further that there was evidence showing such diligence, which should have gone to the jury, we still insist that there was

no error in the action of the trial judge in declining to submit such a question to the jury, because at the time of the injury the foreman of the company in charge of and operating the train, and the immediate superior of the plaintiff, with full knowledge of the defective and dangerous condition of the coupler, actually ordered, directed and witnessed the act of the plaintiff in the performance of which the plaintiff was injured.

J. L. Walters, the foreman, testifies (Rec. pp. 53-54):

"Q. Were you present at the time Mr. Delk got his foot hurt on the 4th of October, last, out here at what is called the new yards of the St. Louis & San Francisco Railroad Company?

A. I was.

Q. Did you see that accident?

A. Yes, sir.

Q. Where were you standing?

A. I suppose about five feet from him.

Q. Just describe to the jury what happened?

A. Well, he was trying to make a coupling between two cars there and it was on a curve and missed the coupling the first time and slacked off and opened the knuckle and tried it the second time, and he give the signal to the man ahead to give a signal to the engineer to back up and he taken his foot to shove the drawhead over and as he went to shove the drawhead over the cars come together and pinched his foot, caught his foot in there. As soon as I saw his foot was caught I give the engineer a signal to slacken off of it, slack ahead off of it. (The witness put his foot against the couplers then

in the court room and illustrated as stated above.)

Q. State whether the car with the coupling in bad order had any card on it?

A. Yes, sir; the F. S. & M. car had a card on it, 'Hold for repairs.'

Q. 'Bad order?'

A. Yes, sir.

Q. Were you foreman at that time?

A. Yes, sir.

Q. Did you direct this man, had you directed this man to go in and make that coupling?

A. Yes, sir; I didn't make that coupling.

The Court: But you directed him to do it?

A. Yes, sir; we was trying to pick that car up.

Q. The two of you were trying to pick that car up, you say?

A. Yes, sir.

Q. Didn't you have it ahold of the engine at that time? Wasn't the engine ahold of it at that time?

A. I don't remember whether the cars was behind it or whether the engine had ahold of the car coupling on the S. F. car or not; I don't remember just now.

The Court: Do I understand you to say that you saw this card upon this crippled car and afterwards that you directed this man to go in and make this coupling?

A. Yes, sir; the card on it was 'bad order, hold.'

Q. Mr. Walters, was that track straight, or on a curve?

A. On a curve.

Q. I will ask you to state in coupling cars with the automatic couplers that are in use,

whether that makes any difference in the coupling?

A. Yes, sir; in some cases it does, even good couplings, we have some trouble on curves.

Q. What happens on curves?

A. Sometimes the drawheads pass one another.

Q. How much of a curve was that? Can you describe or give the jury any idea how much of a curve it is, whether it was much of a curve or a slight one?

A. I couldn't say just how much, but there is a pretty good curve in that track.

Q. What did you say, if anything, to Delk about making the coupling, the manner of making it?

A. I don't remember. I don't remember any conversation at all that passed between any of us at that time.

Q. He just went in there to make it?

A. Yes, sir.

Q. And you stood there looking at him?

A. Yes, sir."

Thus it will be seen that the foreman ordered the plaintiff to do the act, and knowing the bad order and dangerous condition of the car, he stood by and directed it, witnessed the attempt on the part of the plaintiff to make the coupling with his foot.

What boots it how diligent the defendant may have been prior to this time, in the light of this evidence?

The act which led to the injury was done in obedience to the order, and to give the order was assuredly the negligence of the master under the circum-

stances, and rendered immaterial any diligence it may have used anterior to this final act of negligence, which was in and of itself the proximate cause of the injury. The negligence or non-negligence of the defendant in having a defective coupler becomes immaterial when the master, knowing of such defect, commands the servant to use the defective instrumentality. The giving of the order under the circumstances was negligence, as a matter of law.

Labatt on Master and Servant, Sec. 433.

If the servant executed the order in a different manner from that contemplated by the master, or if the performance of the order was so manifestly dangerous that no prudent man should have undertaken it, raises the question of the contributory negligence of the plaintiff, which is discussed later in the brief.

On the trial in the Circuit Court of Appeals, it was insisted that the car was not in use in intersetate commerce when the injury occurred, and that the plaintiff as a matter of law was guilty of contributory negligence. As these propositions may be rediscussed in this Court, we desire now to advert them.

Was the car with the defective coupler at the instant of the accident embraced within the safety appliance act?

It was insisted by the defendant that the car was withdrawn from service and was not employed in interstate commerce. The majority opinion found otherwise. The Court said:

"The question which seems first in order is one raised by the plaintiff in error, and is whether the car to which the defective coupling was attached at the time of the accident employed in interstate commerce. The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for the delivery to the consignee wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and was being hauled upon its tracks when the accident occurred. Johnson v. Southern Pac. R. R. Co., 196 U. S. 1; Chic., M. & St. P. Ry. Co. v. Voelker, 129 Fed. 522." (Rec p. 77).

It is assumed, however, that the defendant may renew its insistence in this Court, and may undertake to have this Court follow the opinion of Judge Lurton, who dissented upon this point. We, therefore, refer briefly to the proposition.

Judge Lurton said on this point (Rec. p. 83):

"I think the stoppage of this car on the dead track was not in any true sense an incident of its transportation in interstate traffic. True, its journey was not finished, but its further journey had been stopped because the next carrier refused to receive it with this defective coupler. There was evidence tending to show that it was not a case of temporary stoppage, such as that in Johnson v. Southern Pacific Company, 196 U. S. 1, but a withdrawal from all use in any kind of traffic until it could be re-

paired. It was placed on a track where cars needing only light repairs were ordinarily placed, and was tagged as 'bad order.' There was also evidence tending to show that the effort to couple this car was solely for the purpose of holding the car, against gravity, in its place on this track until it could be repaired. A car withdrawn from its journey and held upon a dead track to be repaired, is not in my judgment a 'car in use' contrary to the provisions of the Car Coupler Act any more than a car in a shop awaiting repairs."

The learned Judge, and indeed the entire Court, seemed to have been misled by the term "dead" track, as if it were a hospital track, where broken down cars were placed for repairs. As a matter of fact, the track was a *team* track, where cars were placed to be unloaded, and the carriage to be finally completed.

It was called a *dead* track because it was next to the *cemetery.*

Mr. McGregor, the superintendent of the defendant, says (p. 23):

"Q. Why do you call it the *dead* track?

A. The only reason I know is that it is near the cemetery.

Q. Near the cemtery?

A. Leads off from the cemetery."

(The true use of this particular track is shown on page 28.)

"Q. What is it called the *team* track for?

A. Well, it is called the team track because teams can go up to the cars and unload right

out of the cars into their wagon. That's the only track you can unload any car off of."

Briefly, let us refer to the facts in this specific connection:

The defendant's record of said car was brought into Court, under a subpoena duces tecum, and it shows that the car was billed from Giles, Ark., to Memphis, loaded with lumber (22), and at the time of the injury, the car was still in transit in defendant's new yard in Memphis, temporarily deposited on what was known as the "team track." It does not appear when the safety appliance was broken off of the crippled car, nor that the car was inspected before it was received and moved but it reached Memphis and was deposited in defendant's yard on the 28th day of September, 1906, at 4:30 p. m. (22). No evidence was introduced to show the condition the car was in when it was received by the defendant from the little logging road which brought the car from Giles to the main line of defendant. It was kept by the defendant in its yard apparently without any inspection until October 2, 1906, when it was delivered to the Belt or Union Ry. Co., to be carried to the consignee—the J. P. Sullivan Lumber Company (22). The Belt Line declined to accept the car or receive it on its line because the safety appliance was gone and the Belt Line sent it back to the defendant's yard, on the 3d day of October at 7:30 a. m. for said appliance (23). Whereupon, it was deposited by this defendant on the "team track," along with other loaded cars in transit, and

left in its broken condition in that place until the 4th day of October about 12 m. (23). It could have been repaired and rendered safe in ten minutes at a trifling expense (36-53) by the defendant's employe, kept at the yard for the purpose (36-53); but this employe simply put a "bad order" tag upon the car and left it upon this track with other "good order" cars then in use, until after the plaintiff was injured (52). The car was not isolated for repair nor was it put on the track where only "bad order" cars were kept. Defendant had a hospital track about two and one-half miles from there, where cars were left for repair and where it kept all sorts of equipment, but the defendant elected not to take this car to the hospital track (25-26-36-52).

This "team track" was so called because teams can drive alongside of it and load and unload cars (28). It was also called the "dead track" because it was near the cemetery (23). But loaded cars in transit were temporarily left there (54) and the track was in constant and active use by employes who had to be going in upon this track, and coupling and uncoupling cars upon it, every little while (54). It was in, or near, the new yard and the general making up and handling of trains was done there (25-36-54). Moreover, it was on a curve where even good order cars are sometimes difficult to couple and uncouple. Sometimes, in emergencies, light repairing was also done in this yard and upon this track, but the regular repair track, as aforesaid, was at the old yard, about two and one-half miles from there, and there cars in bad order were alone de-

posited (25). The car was being used in interstate commerce (34-37) at the time of the injury and at the moment of the injury, defendant was engaged in an interstate movement, in that it was getting two empty cars from this team track to load for Mobiie, Ala. (45); plaintiff had to switch these two empties and three coal cars from this line of cars (27-45-46), and then he had to put this car back upon the team track and couple it to the others and set the brakes or chock it, as the team track was not only upon a curve, but also upon a grade (36-46).

That this car was loaded with its interstate freight and was still in an interstate movement, though at the time of the accident not on the main line, but on a siding, where interstate cars were being shifted back and forth, would seem too clear for discussion. The repairs needed for this coupler were of the lighest character, requiring not exceeding ten minutes to make. It was not thought necessary to segregate this car from other cars likely to be switched at any moment. Any time the repairer could get a few minutes and catch the car standing still, he could repair it. In the meantime, it continued in active use, imperiling, every time it had to be coupled, the life and limb of the defendant's employe.

In *Voelker v. Chicago, M. & St. St. P. Ry.*, 129 Fed. 522, the car being coupled was on a side track where light repairs were sometimes made, but it was not isolated on a regular repair track which the company had in another portion of its yard.

So in the case at bar the regular repair track was some two and a half miles distant (Rec. 25, 26, 36, 52).

In *Johnson v. R. R. Co.*, 117 Fed. Rep. 462:

The dining car on which was the defective coupler was on a side track at a way station when the accident occurred.

In *United States v. Railroad,* 154 Fed. Rep. 518, the Court uses this language:

> "The phrase 'used in moving interstate traffic,' does not only mean that the car must be actually loaded with interstate traffic, and on its journey from state to state at the time of the alleged violation, but its more natural meaning is, that it is a car that has been used for such purpose, stands ready, and is intended to be used for such purposes whenever needed. It is insisted, however, that these cars were not being used, but were chained together, and on the way to shops for repair. It is true that they were not being used in the sense that they were loaded, so also it is true that they were on their way to the shops, but it is equally true that they were cars used in moving interstate traffic, albeit at this particular time they were empty. They were being hauled over defendant's line of railroad, and were not equipped with couplers coupling automatically by impact, and which could not be uncoupled without the necessity of men going between the ends of the cars. The fact that these two cars were being hauled to the repair shops in the manner disclosed by the evidence cannot avail the defendant. The statute makes no such exception. Moreover, the proof

is, that the defendant had repair shops in Memphis, the point from which these two crippled cars were started on their way to the repair shops at Barring Cross."

In *Railroad v. King,* 169 Fed. 372, which was an action for damages, where the employe was injured in a purely "switching business," on the yards of the company, by the movement of a defective car, the Court says:

> "Was the car movement in question unlawful? From the acts of plaintiff and the car repairer, Toney, in bringing new parts to the place where the defective car stood, the jury were justified in finding that it was reasonably practicable to make the repairs without moving the car. Corrigan decided on pushing the car to the place of supplies, because he thought that there the repairs could more conveniently be made. The movement that was intended and under way when the plaintiff was caught was of a defective interstate car, in connection with other cars, *on an interstate highway,* and so was within the law of the original Act of 1893 as well as of the interpretative amendment of 1903. Now, if the exercise of reasonable care in maintaining the statutory standard of equipment will not exempt a car movement as being beyond the spirit and, therefore, the reach of the statute (St. Louis, Iron Mountain R. R. Co. v. Taylor, 210 U. S. 281; 52 L. Ed. 261; and other cases), much less will mere convenience be accepted as an excuse. Whether or not 'overwhelming necessity' would be available as a ground of exception is a question not properly arising in this record."

In *U. S. v. Railroad*, 167 Fed. 699, the Court said:

> "And, if a defect exists at a repair point, or at any place where such defect could have been repaired, and the company moves the car while in the defective condition, *it does so at its peril,* and it becomes then subject to the penalty of the law. The law is not satisfied by the exercise of reasonable care to this end, but the company must, at its peril, discover and repair *all* defects before removing a car from a repair point." (Pages 700 and 701).

Contributory Negligence.

The trial court's refusal to grant a motion for a peremptory instruction to the defendant on the ground that Delk was guilty of contributory negligence, was assigned as error in the Court of Appeals. In case the assignment might be urged in this court, we briefly discuss same.

In the outset it is well to state that any contributory negligence or assumption of risk is immaterial. The clearly expressed language of the Act shows that assumption of risk is not open to the company as a defense.

By Section 8 of the Act it is provided:

> "That any employe of any such common carriers who may be injured by any locomotive or train in use, contrary to the provisions of this Act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive or car had been brought to his knowledge."

Assumption of risk and contributory negligence have been treated in many state reports and law books as convertible terms. The two shade into each other. So far as the safety appliance act is concerned, to hold them different will give rise to endless confusion and will emasculate the Act of much of its efficiency.

The servant is exonerated by the Act from any assumption of risk and his rights will not be sacrificed by charging him with the same thing under the name of contributory negligence.

> Schlemner v. Buffalo R. R. Co., 205 U. S. 16, 51 Law Ed. 686.
>
> Johnson v. Great Northern Ry. Co., 178 Fed. 643.

The trial judge thought contributory negligence still open as a defense, under the Act, and submitted to the jury the question of Delk's contributory negligence in the following language:

> "Now, the fact that this man went between the cars to couple them, although he knew that the coupler was broken, would not of itself prevent him from recovering in this case, if he was hurt while in there attempting to couple the cars, but I submit to you the proposition whether or not the manner in which he attempted to couple the cars was of itself negligence on his part and whether that negligence was the proximate cause of his injury.
>
> You have heard all the facts and circumstances detailed here by the witnesses, just how he did that, and you will look to all those facts and circumstances, in determining whether or

not he was guilty of negligence or whether or not the manner in which he attempted to couple that car the last time was contributory negligence. And in determining that question you will look to all the facts and circumstances, as I have said, and that includes the facts, if they be facts, that he was there, that he knew that the car coupler was broken, was not according to the law, that he is a man who was experienced in the business in which he was engaged, *that his immediate superior was there and had directed him to go in and couple the cars*, if he did that, that he had gone in and made two efforts to couple the cars and had failed, he then put his foot upon this drawhead and attempted to hold it in place, so that when the cars came back he could hold it in place and they would couple and in doing so, he braced himself on either side with each hand on the grab irons of the car and with one foot on the ground; now it is for you to say, from all the facts and circumstances, those I have specifically referred to as well as all the others, whether the man, who was engaged in the business and had the experience he has had in that business and under the circumstances detailed here by the witnesses, attempted to make that coupling as a reasonably prudent man should have done under the circumstances or under like circumstances.

If you conclude that he did that as a reasonably prudent man, with his experience and observation and the facts and circumstances in the case as I have detailed or undertook to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but

if you believe that his conduct, in the manner in which he attempted to couple that car, was such that a reasonably prudent man situated as he was under all the facts and circumstances that surrounded him there, would not have attempted to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence, and that negligence, if you believe it was the proximate cause of the injury, would be such as to bar him in this action, and that question I leave to you entirely without intimating any opinion about it.

If from anything that has been said during the charge of the Court or anything in progress of the trial, you may have fancied that you understood that the Court believed this or believed that touching the question of negligence, should not be considered by you at all, but independently of anything the Court has said in regard to the facts, you make up your minds from all the proof in the case as to what you think about it each man for himself, and all together.

Now if you decide that this party was guilty of such contributory negligence as would bar his action here under the law as I have stated, you need go no further; just state that you find in favor of the defendant."

We insist that contributory negligence is no defense in a suit of this character and it was error against the plaintiff to have it submitted to the jury.

We submit that the verdict of the jury under this charge is conclusive of any question of contributory negligence.

As this verdict is stamped with the approval of the trial judge, who looked the witnesses in the face, it is hardly necessary to here call attention to any facts which brought about the accident. However, we briefly allude to some of them.

The record shows that this accident was *rehearsed* before the trial judge and jury by the plaintiff at the trial of the case, and that identical couplers were before the jury at the time, and plaintiff placed his foot and reviewed the accident just as it occurred. (Rec. 36, 38, 39 and 53).

Of course the rehearsal could not be copied into the record for the Appellate Court, but it gave the jury and trial judge a great advantage over any appellate court, in determining whether or not Delk was guilty of any negligence in and about the way he attempted the coupling.

The question was lucidly submitted to the jury with broad instructions that if they found any negligence on Delk's part he could not recover. (Rec. 58).

Delk was no green workman. He was a young, athletic switchman and experienced in coupling cars. It is shown and not contradicted that, in trying to hold over this drawhead with his foot he was following the custom in similar emergencies. (Rec. 32). He testified that he had seen it safely done "thousands of times." (Rec. 31).

Now, the trial judge sustained the company's objection to this matter of custom (Rec. 31), but there was no motion to strike out or exclude the answer

given. And the evidence being clearly competent as going to the prudence of the attempt to couple, it is therefore before this Court and will be considered.

1st, Thompson, Con. Negligence, Sec. 32.
Galveston v. R. R., 23 S. W. 503.
R. R. v. Pitts, 42 S. W. 258-9.
R. R. v. Briggs, 23 S. W. 503-4.
Aldrich v. R. R., 60 N. H. 118.

Not only was Delk following the custom in the manner in which he attempted this coupling, but his immediate superior, who represented the master, *ordered him* to do this work, *directed him in its doing and stood within five feet of him and watched the process in silence and thereby acquiesced in the prudence of the attempt.* (Rec. 54).

Delk was furnished no stick or other implement with which to push over this refractory drawhead, and he could not push it over and hold it with his hands. He could get more power against the drawhead by using his foot. (Rec. 30-31). And the grab irons placed upon the car for such emergencies, gave him leverage for his hands and enabled him to protect his head and body. In short, the record shows that this was the only way this coupling could be attempted with any show of success.

It was insisted below that it was negligence in Delk "to attempt to do what had already been attempted twice without success, and that he was hurt by the identical thing happening that had happened before."

But the record does not show that the "identical

same thing happened" on this third attempt. As a matter of fact, the drawhead only jumped over about one and one-half inches on the first two attempts. And the engine came back *slow* in the first two attempts. (Rec. 30).

But the engine did not come back slow, as directed by Delk, and as he had a right to expect, on the third and last attempt. The engine was not then moved as it had been moved the two previous times. Had it done so, the coupler would have only jumped over one and one-half inches and closed the half open knuckle of the other coupler, as it had done the two previous times.

Instead of this, the engineer (either because he did not get or understand the "slow" signal, or that he disobeyed it out of sheer impatience and thought by a harder bump he could effect the coupling) came back with *great force.* And this force was so great that the drawhead jumped over three to three and one-half inches and the knuckles passed clean by each other (Rec. 39), instead of simply butting together and closing the knuckle as before.

Those distances are not so material in themselves, but they become so, as showing the increased and unexpected violence of the backward impact of the engine.

Now had the movement been as the preceding ones, and as *signalled for by Delk* on that occasion (and as he had a right to believe it would be), Delk's foot could not have slipped by the jaw of the protruding drawhead, which was between him and the

other drawhead, and therefore would not have been injured. *The movements were not the same.*

The knowledge that no coupling had been affected in the preceding movements, when the coupler jumped an inch and one-half and closed the half open knuckle upon the other car, did not make the attempt to couple by using his foot to hold over the drawhead negligence as a matter of law. Because the jumping over was only an "inch and one-half" and his foot could not have been reached by this jumping over, as it was probably a foot from the face of the drawhead.

On the contrary the fact that the coupler had only *jumped over an inch and one-half* in the two former attempts, justified Delk in assuming that it would jump no further the third time after he had given the "slow signal," in which event he would have been perfectly safe and his foot would not have been injured.

Was he negligent as a matter of law in doing something which was then shown by experience to be safe, or at least not accompanied by certain danger?

In St. L., I. M. & S. R. R. v. Taylor, 210 U. S. 285, it was contended that the brakeman who went between the cars to make the coupling was guilty of contributory negligence.

It is wholly unnecessary in the decision of the case at bar for this Court to pass upon the distinction, if any, between asumption of risk and contributory negligence. It would seem that these courts, in the past, have held that contributory negligence was still open to the employer, as a defense under

Section 8 of this Act. Nor, is it necessary, in deciding the case at bar, to hold differently. The Court below held with the defendant on this proposition, and sent the case to the jury for a decision upon the question of contributory negligence.

However, in passing, we desire to call the Court's attention to the fact that the Supreme Court strongly intimate in its recent opinion that the defense of contributory negligence is not open under Section 8 of the Act.

While, theoretically, there may be a distinction between the contributory negligence of an employe in making a coupling and the assumption of the risk occasioned by a disordered coupler, the practical difference is hard to grasp and still harder and more delicate to apply. The most recent decision of the Supreme Court of the United States on the construction of this Act was rendered in March, 1907. The case is styled Schlemmer v. the T. P. R. R. Co. and reported in 205 U. S. 11, 51 Law Ed. 681. This case is a fair illustration of how far the Court goes toward construing this act to compensate the injured employe and attain the intent of Congress in its enaction.

In this case Schlemmer was directed to couple together a shovel car and a caboose. The cars did not couple together automatically by impact. The coupling had to be done by lifting the free end of a draw bar and sliding it into a slot on the coupler of the caboose. The car and caboose would crush anyone that came betwen them if the coupling failed to make. Schlemmer was ordered to make the cou-

pling as the train was slowly approaching the caboose; he was twice warned by the conductor to "keep his head down," but he disregarded this warning and without any reason whatever for so disregarding it, he lifted his head, in the face of the warning, and it was crushed between the two cars.

It would be hard to imagine a case which, at first glance, appeared to involve grosser contributory negligence, if that defense is still open without limitation, than presented in Schlemmer's case.

Schlemmer's widow brought suit in the State Court of Pennsylvania and the jury were instructed by the Court to return a verdict for the defendant on the ground of Schlemmer's contributory negligence. This judgment was affirmed by the Supreme Court of Pennsylvania. It was carried to the Supreme Court of the United States from the Supreme Court of the State and said Court reversed and remanded the case for a new trial. The majority opinion of the Court was rendered by Mr. Justice Holmes and it would seem from this opinion that under Section 8 of the Safety Appliance Act, the defense of contributory negligence is not open to the railroad company in cases of this sort. If the rule of construction there enunciated and formerly announced in the Johnson case by the same Court, is adhered to, it certainly is not open. At the very least, the Court express a strong intimation that it will so hold if called upon to do so. In almost every case the servant's rights are sacrificed, in the event con-

tributory negligence is allowed as a defense, by practically charging him with the assumption of the risk under another name.

The Court says in Schlemmer's case:

* * * * * * * *

> In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions *and by statutes like Section 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of laissez faire to exist.*
>
> Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. *He is held to assume the risk upon the same ground.* Choctaw, O. & G. R. R. Co. v. McDade, 191 U. S. 64, 68; 48 Law Ed. 96, 199; 24 Sup. Ct. Rep. 24. Apart from the notion of contract rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligence. But

the difference between the two is one of degree rather than of kind, and when a statute exonerates a servant from the former if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), unless great care be taken, the servant's rights will be *sacrificed by simply charging him with assumption of the risk under another name.* Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms. Patterson v. Pittsburg & C. R. Co., 76 Pa. 389; 18 Am. Rep. 412. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound. * * *

It seems to us not extravagant to say that the final ruling was so implicated with the earlier error that on that ground alone the judgment should not be allowed to stand. We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any, came later. We doubt if this was the opinion of the Court below. But suppose the non-suit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, *because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name.* If

a man not intent on suicide, but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position to direct a heavy drawbar moving above into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local Courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume that to enforce the statute requires that the judgment be reversed."

Now, in the case at bar, the proof shows, and it is not contradicted, that it was fairly safe for plaintiff to place his foot against the side of the drawhead and to so hold it, until the cars met, provided the cars were moved back slow and easy in accordance with plaintiff's signal. (Rec. 37.) In fact, defendant's counsel there admits in so many words, that plaintiff would not have been injured (notwithstanding the position of his foot) if the cars had been moved together slow. Placing the foot against the loose drawhead and holding it in place until the knuckles hooked into each other was not primarily, and under ordinary circumstances, negligence. But it is insisted that this conduct became contributory neg-

ligence when the engineer disobeyed the signal and came back violently. Or in other words, defendant contends that because plaintiff, to a certain extent, assumed that the engineer would push the cars back slowly and carefully in accordance with the signal given by the plaintiff, and the custom; and when, as a matter of fact, the engineer came back, rapidly and violently, contrary to the signal and custom, then this mistaken assumption rendered plaintiff guilty of contributory negligence per se. We respectfully submit that plaintiff's conduct was not contributory negligence, in any sense.

He had a right to assume that the master had furnished him with a safe and prudent engineer and some reliance upon him doing his duty could not be contributory negligence.

Amprey v. the R. R. Co., 93 Va. 108.
Rudd v. the R. & D. R. R. Co., 88 Va. 648.
Steele v. the R. R. Co., 14 Utah 383.
Curtis v. the Chicago R. R. Co., 95 Wis. 460.

The defendant could not delegate the duty it owed plaintiff of keeping these couplers in repair. Nor could it shield itself behind the fact that the *negligence of the engineer or other employe, contributed to produce the injury.*

"If the negligence of the master, combined with the negligence of a fellow servant, and the two contribute to the injury, the servant injured may recover damages of the master."
Amprey v. R. R. Co., 93 Va. 130.
4 Thompson Com. on Law of Neg., Secs. 3858 and 4856.

Danielson v. N. W. Feed Co., 57 Fed. 915.
Young v. R. R. Co., 49 Fed. 723.
L. & N. R. R. Co. v. Kenley, 92 Tenn. 207.
Cone v. R. R. Co., 81 N. Y. 206.
Cooley on Torts, 560.
1st Sherman & Redfield on Negligence (5th Ed.), Sec. 188.
Cummings v. the R. R. Co., 106 U. S. 700.
Booth v. R. R., 73 N. Y. 38.
Velker v. Ry. Co., 116 Fed. (supra).
Palmer v. Ry. Co., 34 N. J. L. 151.
Amprey v. the R. R. Co., 93 Va. 108.
Elmer v. Bogle, 135 Mass. 575.
Henderson v. R. R. Co., 37 Ohio State, 549.

It is precisely what every other prudent switchman would have done under the same circumstances. If it be conceded that it is negligence, it was negligence assumed by contract with the master of which the master knew or should have known and the results of which plaintiff is expressly relieved by Section 8 of the Act. If Schlemmer's miscalculation in raising his head too high after he had been twice warned was excusable and could not be charged against him as contributory negligence, but was a risk assumed by contract with the master; we earnestly submit that this plaintiff's miscalculation, in assuming that the engineer would comply with his signal was far more excusable, a great deal further removed from contributory negligence and much nearer a risk assumed by contract.

Section 8 declares that no employe * * * shall be deemed to have assumed the risk *thereby occasioned.*

Now, what were the risks "occasioned" by the absence of the safety appliance on car No. 21696 in the case at bar? He was a switchman and contracted to do the duties of a switchman which largely involved the coupling and uncoupling of cars. The risk occasioned by the absence of the chain and pin, was not only the risk of going between the cars, but all the *risks incident to coupling the car.* It occasioned the risk of being injured while between the cars by reason of the engineer disobeying or misunderstanding the signal of plaintiff and coming back in a manner not signalled; it occasioned the risk of injury to some other portion of the body, if the coupler could not be manipulated with the hand. It occasioned the necessity, in this instance, of plaintiff using his foot to push over and hold the defective drawhead and all risk engendered thereby, and it occasioned all the risk that customarily went with a coupling of this character.

Now, if a master tells a servant to do such and such a thing, and the servant sees the danger or knows the defects of the appliance used, and the liability he is incurring, his undertaking to comply with his master's wishes is an *assumption of the risks involved.* It may be negligence on his part to do what he is doing, but, as before stated, it is negligence assumed by contract with his master and of which his master had knowledge, and Section 8 relieves the servant from such an act of negligence.

On the contrary, if a servant, in the course of his employment, does an act not demanded or called for by the master, such an act is negligence and its com-

mission by the servant amounts to contributory negligence.

In the case at bar, it is clear that plaintiff is protected under Section 8 from the conduct of going between the cars. It is contended that his contributory negligence, if any, came later. Yet, the act of going between the cars, was only a portion of the risk occasioned by the defective coupler. He must still couple or make an effort to couple, the cars, and everything incident to the rest of the job, was just as much a part of the "*risk occasioned,*" as was the preliminary conduct of going between the cars. The drawhead was in such a condition that he could not push it over with his hands and hold it in place; the surroundings and circumstances then demanded that he use that portion of his body wherein he could get the most force against the drawhead, and he placed his foot behind the jaw in an apparent place of safety and gave the signal to come back slow and easy. (32.) Using his foot to hold over the drawhead was not an act outside of the usual routine under the circumstances. In doing this, plaintiff followed the custom (32-33) he had so often seen, of which defendant knew and plaintiff's foreman stood a few feet away and watched his attempt without a word of warning and acquiesced in the apparent prudence of the effort. There was nothing done not demanded by the occasion and by custom and it was all assumed by contract with the master. The Court, under the law, could well have charged the jury to find for plaintiff because covered by Section 8 of the Act.

Since the trial Judge did not take this view but adopted a course far more liberal to the defendant than probably allowed by law and sent the case to the jury; and since it is not necessary that this Court in making a final disposition of this case, decide whether or not plaintiff was protected throughout by Section 8 of the Act, it may be an unnecessary waste of time to discuss it further. We only refer to it now to stress that the defendant is certainly in no position to complain at the Court for giving it the advantage of every doubt and of the most liberal construction of the act in its favor.

Under the recent construction of the act, the defense of contributory negligence is not open to the company, under Section 8.

If we go a step further and concede for the sake of the argument that plaintiff's conduct was contributory negligence (which is not true) the defendant would not even then have any ground to complain, for the Supreme Court strongly intimated, as aforesaid, that they will hold, when it becomes necessary to decide the question that this defense is not open under Section 8 of the act. Indeed, many of the State courts have already held it and the others are coming to it by degrees. The rule of construction applied to every other part of the act by the recent decisions of the Supreme Court makes this construction inevitable if there is consistency. Under the view that Section 8 of the act abrogated the common law, and that the act imposed a penalty, and that therefore the whole act was subject to the rule of strict construc-

tion, these courts and a few of the State courts have held that the defense of contributory negligence was still open under Section 8 of the act. But since the recent decision and rule of construction enunciated, the necessity and reason for such construction no longer exists.

We respectfully and earnestly submit that the act should be construed so as to close the door to the defense of contributory negligence under Section 8. No employe can assume any risk imposed by his master's negligence. To hold otherwise would be imposing upon the servant too many implied contracts and overlooking entirely that the master failed in his duty. No matter what theory may say, every one knows that from a practical standpoint the servant is not on equal footing with the master. He must go between the cars and use the defective appliance or lose his job. He must do his best with the machinery furnished by his master, whether it be good or bad. If he doesn't do it, the railroad company will get some one that will. If all employes should refuse to go between the cars and attempt to couple defective cars, the entire transportation service of the carrier would be obstructed. Such condition would not only endanger the entire train hauled, but would endanger trains coming from other directions and bring about a blockade. As was said by the Supreme Court in the case of Kane v. The R. R. Co., 128 U. S. 91:

> "But we are of opinion that the question of contributory negligence should have been submitted to the jury. It cannot be said that the plaintiff was guilty of contributory negligence

> in staying upon the train, in the capacity of brakeman, after observing that a step was missing from one of the cars over which he might pass while discharging his duties. Any employe upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, *not to abandon his post unnecessarily.*"

And we therefore submit, it should be the uniform law of this land that no carrier upon being sued for damages occasioned by its violation of this statute should be permitted to say to the plaintiff, its employe, "We created a dangerous condition in disregard of the law and imposed a dangerous duty upon you, but we do not have to recompense you for your pain and suffering, expense and loss of time, because you did not use the *extraordinary* care to avoid injury that the dangerous condition of the coupling device rendered necessary." The lawbreaker should not thus be permitted to benefit by its own wrong. It should not be permitted to plead the lack of care on the part of the employe to defeat the demand for compensation for damages, primarily due to its own lawless act. It will not do to say that such a construction of this act would have a tendeny to make employes reckless and to adopt the most dangerous method of coupling and uncoupling. Even if this were sometimes the result, it would be no argument against the wholesomeness and humanity of the construction as a whole. It is in the company's power by complying with the law to deny him the *opportunity of doing the work negligently.* But as a matter of fact, no such result would any more follow than

an accident insurance policy on his life would cause a man to be more reckless with his life.

This construction is simply carrying out the intent of Congress, as we see it. As stated in the Johnson case, the design to give relief to employes was more dominant than to inflict punishment. Hence there was a fine of but $100 as a matter of punishment alone, but it was principally intended to relieve employes of common carriers from the stringent rules of the common law governing defenses in actions of damages between master and servant, and remove from the carriers' reach a greatly favored method of defense in such cases and thereby compel or induce the carrier to a prompt and strict compliance with the requirements of the law as to the equipment of its cars. The intention was to render the company at least prima facie liable to respond in damages in every case where an employe engaged in handling improperly or defectively equipped cars, receives an injury. By abolishing the defense incident to the relation of employer and employe it was intended to make it to the greater interest of the carrier to equip its cars as required by law.

As is said by Caldwell, J.:

> "Whenever it is made to appear to a railroad company that it costs more to pay the damages assessed against it by the verdicts of juries for maintaining a dangerous condition of its appliances than it would cost to substitute safe ones in their places, the substitution is quickly made. But as long as courts hold as a matter of law that what the witnesses in this case declare to be 'simply a death trap,' may be maintained

with impunity and without incurring any pecuniary liability, the death trap will remain and the slaughter go on."

So that, in its desire to protect trainmen, Congress took this additional means to enforce compliance with the law. The courts are fast coming to the finding that contributory negligence will not be permitted to bar under Section 8.

Elmore v. Seaboard Air Line R. R. Co., 130 N. C. 506.
Greenlee v. Sou. Ry. Co., 122 N. C. 977.

And there is abundant authority that contributory negligence cannot be pleaded as a defense where the proximate cause of the accident was the defendant's failure to comply with a statute.

Abbott v. Carterville Coal Co., 181 Ill. 495.
Flippo v. the R. R. Co., 138 Ala. 487.
Troxler v. R. R. Co., 124 N. C. 191.
Fleming v. R. R. Co., 42 S. E. 905.
McDonald v. Union Pac. Co., 152 U. S. 262.
The Pennsylvania R. R. Co., 19 Wall (U. S.) 125.
Flint v. Lull, 28 Mich. 510.
Ross v. Jefferson R. R. Co., 37 Ind. 545.
Burke v. R. R. Co., 6 Cold (Tenn.) 46.

The Case Was Properly Submitted to the Jury.

The view of the trial court was in defendant's favor upon the aforesaid contention, rendering it unnecessary for this Court to pass upon it, in the case at bar, but it should be considered in connection with the other contentions of counsel on the other side.

After the Court's generous treatment of the defendant, we are loath to believe that learned counsel can seriously challenge the correctness of the case going to the jury, under the facts. Defendant should be content that a verdict was not ordered for plaintiff. The principle is so elementary that such cases should be left to the jury, even where no act is involved abrogating the common law like Section 8, that it is hardly necessary to cite authorities.

Plaintiff was a young, athletic and experienced switchman. It is shown and not contradicted that, in trying to hold over the loose drawhead with his foot he was following the custom, in similar emergencies (32). He had seen it safely done "thousands of times."

There was little, if any, danger in placing his foot in that position if the engineer had obeyed the signal and come back easy (37), as the protruding jaw of the drawhead was between plaintiff's foot and any place of danger. He was furnished no stick or other implement with which to hold it over; he could not hold it over, or even push it over with his hand; he could get the most power against the drawhead with his foot (32) and the grab irons placed upon the car for such emergencies gave him a leverage for his hands and enabled him to protect his arms and body. Moreover, his immediate superior ordered him to do the work; directed him in its doing and *stood within five feet of him* and watched the entire process in silence and acquiesced in the prudence of the attempt after Delk had twice endeavored to hold the coupler in place with his foot.

To say that these facts did not, at the very least, demand a submission of the question of contributory negligence to the jury is too absurd to dignify with a denial. To aver that all reasonable men would agree that these facts in such a case constitute contributory negligence on the part of the employe is a libel on mankind.

On every principle of law and reason there could be no error, of which defendant could complain, in submitting the case to the jury, as the following authorities, in cases of the same character (and cases cited there), abundantly illustrates:

Schlemmer v. Buffalo R. Co., 205 U. S. 11, 51 Law Ed. 681.

Elmore v. the Seaboard Air Line Ry. Co., 131 N. C. 569.

Tynan v. the Pacific Ry. Co., 119 Fed. 288, 56 C. C. A. 192.

Voelker v. Chicago M. St. P. Ry. Co., 129 Fed. 522, C. C. A.

Arrighi v. the Denver, R. G. R. Co., 141 Fed. 67, C. C. A.

Ives v. the R. R. Co., 144 U. S. 408, 36 Law Ed. 485.

Kane v. Northern Central Ry. Co., 128 U. S. 554, 32 Law Ed. 339.

Archibald v. Texas & Pac. R. R. Co., 170 U. S. 667, 49 Law Ed. 1188.

Cox v. the Tex. & Pac. R. R. Co., 145 U. S. 593, 36 Law Ed. 829.

Gardner v. the Central R. R. Co., 150 U. S. 349.

Lefturch v. the St. L. & I. M. Co., 117 Fed. 228, 54 C. C. A.

Tennessee v. Choctaw, O. & G. R. Co., 116 Fed. 23, 53 C. C. A. 497.
Kellogg v. Sioux City R. R. Co., 84 U. S. 665, 21 Law Ed. 745.

It is needless to burden the Court with further authorities on a principle so well settled and so elementary.

There was no comparison between plaintiff's conduct in the case at bar, in respect to the prudence exercised in the coupling, and that exercised by plaintiff's intestate, in the Schlemmer case (supra). In the latter case, the plaintiff's intestate was twice warned by his immediate superior not to do the thing, the unnecessary doing of which, caused him to lose his life. While in the case at bar, plaintiff's immediate superior ordered him to do the work and stood within five feet of him approving his conduct and watching him from the very beginning (59), and *never said one word.* If it had been reckless or imprudent for plaintiff to place his foot against the side of the drawhead and thus try to effect the coupling, it stands to reason that this foreman, who represented the master in the premises, would have said something, or at least, testified to that effect. In fact it was his imperative duty to warn plaintiff of imprudence and the failure to do it would make the master liable anyway.

Now, if plaintiff was negligent in placing his foot there, the master, through his representative (the foreman), knew of that negligence and could have avoided its effect (59) by signalling the engineer,

and his failure to do this would render the defendant liable under another principle.

See Ives v. R. R. Co. (supra).
Davies v. Mann, 10 Mees. and W. 546.
Tolson v. R. R. Co., 139 U. S. 551.

Again, plaintiff was but following the usual custom in the case at bar (32) while Schlemmer was directly disobeying orders. Schlemmer was also furnished with a tool to effect the coupling and he elected not to use it. Plaintiff, in the case at bar, was furnished no such tool and there was none available. Yet the Supreme Court of the U. S. held that even Schlemmer's case should have been submitted to the jury and reversed and remanded it for a finding from the jury. If that case should have gone to the jury, would any sane man say this case should not have, at least, been submitted to the jury?

The defendant created a dangerous condition by its negligent failure to comply with the safety appliance act, and thereby imposed upon plaintiff the dangerous duty of going between the cars and holding over the drawhead to make the knuckles meet.

If the trial court had held that the position in which plaintiff placed his foot and that fact alone was contributory negligence as a matter of law, it would have resulted in a total destruction of the Safety Appliance Act in His Honor's jurisdiction, as a protection for railroad employes, because he would be bound by the precedent thus established, and all of his future decisions in similar cases, would turn on the position in which the employe had placed

his feet, hands, head or body, and the logical conclusion would be, that if an employe was killed or injured in handling a defective coupler, that fact alone would bar recovery.

Juries are by far the most fitted tribunal to judge of the conduct of mankind generally, and their decision either way simply settles one case and does not affect the rights of other litigants under the same law; for there are many questions which necessarily grow out of the facts of each particular case, which should be referred to the jury, and the fact common to all such cases, where the servant in obedience to the order of his master, incurs the risk of dangerous machinery, where it is reasonably probable that it might be safely used by extraordinary care, *is whether or not a man of ordinary prudence would have done as he did.* This law is bound to prevail "because it is generous in its purposes, in harmony with the best sentiments of a humane people and a progressive government," and appeals strongly to the sense of justice inherent in every human heart.

Now, in the case at bar, as before stated, it was customary for a switchman to use his fot in effecting a coupling when the drawhead was refractory and the knuckles would not meet and slip into each other (32), and plaintiff had seen it done thousands of times. In short, it was the only way he could do it. The uncontradicted proof shows he couldn't push the drawhead over and hold it with his hands. He was furnished no tool to do it with. The drawhead had to be pushed over and held if the car was

coupled. He may have been able to have done it with his shoulder, but this mode would have jeopardized his head and body. He selected the least dangerous way to do a dangerous duty, imposed upon him by his master's negligence.

The case of Elmore v. Seaboard Air Line Ry. Co. (supra) (cited by defendant) was precisely the case at bar. In this case the Supreme Court of North Carolina affirmed a verdict for plaintiff where his foot was mashed in the same manner as the foot of the plaintiff in the case at bar. The car was originally equipped with automatic couplers which had been allowed to get out of repair. The Court say in the opinion:

> "The plaintiff testified that he was ordered to make a coupling and was injured in so doing. He testified: '*If the coupler had been in perfect condition I would have been able to couple without putting my foot between them* (the cars). If the link had been in perfect condition, I would not have had to kick it,' and much other evidence to the same purport; *that he used his foot instead of his hand, because the coupler being out of order, and no stick being furnished him, he could only make the coupling which the conductor ordered him to make by using his foot or hand, and he had more power in his foot; that he had seen his conductor use his foot to couple in that way, and the conductor had seen him and others do so.* The trial judge substantially charged the jury that if the coupler was in repair, the defendant was not guilty of negligence; or, if the lack of repair of the coupler did not necessitate the plaintiff going between the cars

to couple, there was no negligence on the part of defendant; but that, if the coupler was out of condition for such length of time that the defendant could have had it repaired, but failed to do so, and that plaintiff would not have been injured but for the condition of the couplers, and that in the condition in which the coupler was it was necessary, in order to couple the cars, to use the hand or foot, and that the plaintiff was under the orders of the conductor, who directed him to couple the cars, and in so doing plaintiff was injured; and if the jury find that he would not have been injured but for the condition of the couplers—then the jury should find the first issue 'YES.'

On the second issue, the Court instructed the jury that if the coupler was out of repair, and had been for such a length of time that the defendant knew or should have known it, and with the exercise of reasonable diligence could have had it repaired and the plaintiff coupled the cars under the direction of the conductor, and that it was plaintiff's duty, to obey the conductor, and he would not have been imperiled but for the condition of the coupler, to answer the second issue (contributory negligence) 'NO.' ''

The Court held that defendant's negligence in having the coupler out of condition was the "causa causans" and affirmed a verdict for plaintiff.

In Tynan v. The R. R. Co., *supra,* the facts are similar to the case at bar. The coupling was attempted on a curve; the couplers were out of repair and would not couple together automatically by impact. The defendant contended that Tynan was guilty of contributory negligence as a matter of law,

in making the coupling from the inside instead of the outside of the curve; and by placing the link into the skeleton drawbar instead of in the Miller hook. It regularly requested the Court to charge the jury to find for defendant on account of this alleged contributory negligence. This the Court declined to do. Verdict for plaintiff and the company assigned the Court's refusal to so charge the jury as error. The Circuit Court of Appeals say on page 292 of the opinion:

> "The burden of proving contributory negligence on the part of the employe is always cast upon the railway company, and the general rule is that it must not only appear that the employe was negligent, but it must also be shown that his negligence contributed to the injury. Coasting Co. v. Folsom, 139 U. S. 551, 35 Law Ed. 270; Railway Co. v. Volk, 151 U. S. 73, 38 Law Ed. 78.
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> * * * * * *
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> But in any event the question of contributory negligence under the testimony, including Rule 25 of the railway company, was one of fact for the jury to determine. The law is well settled that no case should ever be withdrawn from the jury unless the conclusion necessarily followed as a matter of law, that no recovery could be had upon any view which can be properly taken of the facts, which the evidence tends to establish. (Citing authorities.)"

In Johnson v. The R. R. Co., *supra*, the plaintiff was compelled to go between the cars to effect the coupling. The cars were equipped with automatic couplers, but they would not couple with each other by impact. He made two efforts to make the coupling

and both failed. He then undertook to make the coupling with a link and pin and got his hand mashed in the attempt. He was charged with contributory negligence for substituting the link and pin and trying to make the coupling with it. The trial court instructed the jury to find for defendant and the Court of Appeals affirmed the judgment. The Supreme Court of the United States, speaking through Chief Justice Fuller, reversed and remanded the case.

Although the Supreme Court pretermitted in its opinion the question of contributory negligence, by reversing and remanding the case *for another trial* before a jury, it indirectly held that the case should have been submitted to the jury. For if the record disclosed that Johnson's contributory negligence as a matter of law barred recovery, the other errors assigned would have been harmless and the Court of Appeals and trial court had arrived at a correct conclusion, although upon erroneous grounds, and the Court would have dismissed the suit instead of remanding for another trial.

Voelker v. The R. R. Co., *supra,* is on all fours with the case at bar. The car sought to be coupled in the case had the same defect as the one in the case at bar. "The link connecting the lever and the pin was loose, broken and disconnected and the coupler was so old, worn and rickety that the pin could not be raised, thus making it necessary, in order to effect the coupling, for him to go between the cars and insert his hand in the coupler, push the tumbler away from the frame and then raise the tumbler and pull the knuckle in order to effect the coupling; and while

so engaged a cut of cars were kicked against the cars being coupled, by others of his switching crew, without any warning to Voelker, and crushed him to death. The car being coupled *was on a side track where light repairs were sometimes made, but it was not isolated on a regular repair track which the company had in another portion of its yard.* The company depended on contributory negligence, claiming that the track where this crippled car was deposited was a repair track and known to be such by plaintiff; that the safety appliance act did not apply and that Voelker therefore assumed the risk, under the common law. The case was submitted to the jury and verdict for plaintiff and while the Circuit Court of Appeals reversed the case because of an error in the charge, it held with plaintiff on the construction of the safety appliance act and that the defense set up by the company was not sound; that the act applied under the facts of the case and that the case was properly submitted to the jury. We quote from this opinion in another portion of this brief.

The case of Arrighi v. The R. R., *supra,* has been twice passed upon by the Court of Appeals. Counsel for defendant in his brief below also cites this case to support his contention (129 Fed. 347). Upon the condition of the record at that time the Court reversed the case because the evidence showed that the engineer was under the direction of Arrighi at the time, and the train was backed against the car so slow that it barely moved. The car was equipped with the old-fashioned link and pin. The evidence dis-

closed that Arrighi took hold of the link on the appoaching car to guide it, and having done so, left his hand between the drawheads (for no apparent reason), until his fingers were crushed by the impact. His attention was not momentarily distracted nor did the moving car approach more rapidly than he calculated, neither did he stumble and lose his balance, and it did not appear that he endeavored to remove his hand. The Court held that the injury was due to Arrighi's own negligence and that the proof before the Court was tantamount to his deliberately and voluntarily placing his hand where it was bound to be crushed and leaving it there without attempting to take it out of the way. The Court reversed the case, but substantially said in the opinion, if there had been any excuse assigned for Arrighi's carelessness the result would have been different.

Counsel for defendant unconsciously omitted to add that this case was again tried, submitted to a jury; and a verdict awarded plaintiff and *this verdict was affirmed by the Circuit Court of Appeals.* (See 141 Fed. 66), the evidence on this trial supplying what was formerly omitted.

However, the Arrighi case, even under the first holding (129 Fed. 347) does not touch the case at bar. The facts not present in the Arrighi record on which absence the reversal turned are very much in evidence in the case at bar.

In Arrighi's case there was no defect in the couplings which contributed to the accident while in the case at bar, there were defects in the couplings

themselves, actively causing the injury. There were no exceptional circumstances in the Arrighi case which contributed to the accident, while in the case at bar there were many; Arrighi directed the engineer in the movement of the cars that hurt him and the engineer backed the cars back so slowly as to be barely moving; while in the case at bar, plaintiff did *not* direct the engineer, but had to signal through others and the cars came back *rapidly and violently* and that, too, after plaintiff had given a signal to come slow, which signal he had a right to believe would be obeyed; and Arrighi's attention was not distracted and it did not appear that he made any attempt to remove his hand; while in the case at bar, plaintiff's attention was concentrated upon the refractory drawhead and he removed his foot at the very earliest moment.

In *Ives v. The R. R. Co.* (supra) the Supreme Court of the United States says:

> "In determining whether the deceased was guilty of contributory negligence, the jury are bound to consider *all* the facts and circumstances bearing upon that question, and not *select one particular prominent fact or circumstance as controlling the case to the exclusion of all others.*"

So the Court below was correct, in declining to select the isolated fact of plaintiff using his foot to push over the drawhead and that fact alone, to the exclusion of all others and in declining to instruct for the defendant on this single ground.

The trial Court very properly submitted that, to-

gether with all the rest of the surrounding circumstances, to the jury and let them pass on the conduct of plaintiff in making the coupling. As was said by the Supreme Court in the Ives case (supra):

> "What may be deemed ordinary care in one case, under different surroundings may be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the Court. It is their province to note the special circumstances and surroundings in each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the Court."

It is unnecessary to review the decisions further, they are all to the same effect.

Counsel on the other side say: "Men's feet are not designed for the purpose of making couplings; neither does any necessity appear in this record for him to put himself in such a dangerous position."

It is probably true that "men's feet are not designed for the purpose of 'making couplings.'" Nor does the proof show that plaintiff was endeavoring to "make the coupling" with his foot. He was simply *holding over the drawhead with his foot* with the

intention of allowing the coupling to be made automatically by impact. As far as that is concerned, men's hands are not designed to make couplings. That is, the Safety Appliance Act is intended to abrogate the use of hands and feet as well as all of the rest of the body in making couplings. The law intends that these couplings are to be made by raising a lever from the outside of the car and allowing the cars to come together and thereby join the couplings. Had it not been for this defendant's negligence, the *necessity* would not have arisen to use the foot or hand either. But when the necessity did arise, by reason of defendant's disregard of the law, this plaintiff had to use that portion of his body wherein he could bring the greatest force to bear against the side of the drawhead, to hold it over.

As far as the "necessity" of using the foot is concerned, the proof shows, and it is not contradicted, that this was the only way the coupling could have been attempted with any reasonable hope of success. And while counsel criticizes the manner in which plaintiff undertook to make the coupling, it is rather significant that the defendant did not show by its proof, a safer or for that matter any other method by which the coupling could have been made. It is true that counsel vaguely suggest in their brief that plaintiff should have used "a piece of wood or bar of some inanimate substance to push the drawhead over," but no such tool was furnished plaintiff, and there is no proof showing that there was any such thing available with which to do the work. If there

had been such a tool in reach of plaintiff, it stands to reason that his immediate superior, who stood at his side, directing and superintending his effort, would have said something about it. There is certainly no evidence showing that such a tool was used by switchmen in couplings of this character, and the burden of showing contributory negligence in failing to use a tool of this sort is on the defendant. On the contrary, the uncontradicted proof shows that the customary way to hold over the drawhead was with the foot as plaintiff was doing.

Presence of the Master.

As bearing upon the question of contributory negligence, the order of the master to make the coupling, the presence of the master superintending the method of doing it, his approving the manner in which it was attempted to be done, certainly justified the trial judge in submitting the question of contributory negligence to the jury. We believe this conduct of the master exculpated the plaintiff as a matter of law from the charge of contributory negligence.

Labatt, on Master and Servant, says (Sec. 439):

> The servant "is said to be entitled to obey a specific command of his superior without incurring thereby the imputation of contributory negligence, unless the execution of that command involves a hazard to which no ordinarily prudent person would have subjected himself; or unless a reasonably prudent person in his sit-

uation and with his knowledge of the danger would not have obeyed the command; or unless the danger was so 'apparent' or 'obvious' or 'clear' or 'manifest' or 'glaring' or 'imminent' that a person of that average prudence and intelligence whose hypothetical conduct is the test of the existence or absence of negligence would have declined, under the given circumstances, to have complied with the order. In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order.

It does not follow that, because disobedience to the order would have been justifiable, the servant was guilty of negligence in obeying it. Still less will the employer be permitted to escape liability on the ground that by disobeying the order the servant would have avoided injury, where it is a reasonable inference from the testimony that it was the servant's duty, under the given circumstances, to encounter the danger in question. Nor does it follow that because it may be negligence for a superior servant to order his subordinates into a dangerous position into which he himself is to accompany them, they are therefore negligent in complying with the order."

This case was tried before the Court and jury. The witnesses were all before them and they had the opportunity of looking at them and hearing them testify. In addition to this, the coupling was illustrated with drawheads laid on chairs, and plaintiff

showed exactly how it was done (a process that could not be copied in this record). The case was properly submitted to the jury and they were instructed that if plaintiff made the coupling in a negligent manner under the circumstances, that they must find for the defendant, but otherwise the verdict must be for plaintiff. These twelve good and sensible citizens have found for plaintiff. This finding has been approved by the learned trial Judge. We, therefore, submit that the question of contributory negligence is forever closed.

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Attorneys for Plaintiff in Error.
LUTHER WALTER, of Counsel.

L. P. Berry

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

E. M. DELK,

vs.

THE ST. LOUIS & SAN FRANCISCO R. R. CO.

No. 88.

On Writ of Certiorari to the United States Circuit Court of Appeals, 6th Circuit.

REPLY BRIEF ON BEHALF OF PETITIONER, E. M. DELK.

May It Please The Honorable Court:

The petitioner deems it best to reply to some of the contentions made by the respondent which are not embodied in the briefs heretofore filed.

There have been so many decisions cited and quoted from by the parties to this litigation that it would seem totally unnecessary to call the Court's attention to other decisions.

However, we desire to call the Court's attention to a case decided by the United States Circuit Court of Appeals, Second Circuit, appealed from the Southern District of New York. This suit is styled, *Erie, R. R.*

Co., Plaintiff In Error, *vs. Blanche Russell, Admrx.*, Defendant In Error, and was decided by the Circuit Court of Appeals, December 2nd, 1910, and is not yet reported. This case bears a striking resemblance to the case at bar. A switchman was killed and his administratrix brought suit, relying upon the "Safety Appliance Act."

The car in this case was billed to the repair shops at Port Jervis, as it had a defective coupler, the knuckle being gone. The train, including the cripple car, was left standing on a switch in the Port Jervis freight yard.

Plaintiff's intestate was one of the night switching crew in the yard and was drilling and switching cars from the different trains that had come into the yard. Before supper, three cars had been placed on the No. 6 switch in the yard and left standing there. This switch had a slight grade. After supper, the switching crew ran the car in question, attached to other cars, upon said No. 6 switch.

The intention of the crew, was to repair the defective coupler, and after repairing it to couple the train containing this car and the three cars which had previously been left upon the switch. In backing up the train, this car came in contact with the other three cars but was subsequently pulled away from them some five or six feet. The switching crew then started to look for a knuckle with which to repair the defective coupler. Knuckles were kept in various places

in the yard and the switchmen were accustomed to replacing those found missing.

Plaintiff's intestate was the first to find one and he went in between the cars and attempted to adjust it in the coupling apparatus but the pin would not fit and one of the other men went to look for another pin.

Plaintiff's intestate, Russell, was holding the knuckle in place with his back to the three standing cars when without any apparent cause, they moved silently down and crushed him, inflicting the injury from which he died. The car was empty. It was taken the next day on the easternly trip and hauled to Goshen, N. Y.

It will be seen that this case is nothing like as strong for the plaintiff as the case at bar.

There was a judgment for plaintiff in the Court below and it was appealed to the Court of Appeals of the Second Circuit. This Court, speaking through Noyes, Circuit Judge, affirmed the judgment of the Court below, stating among other things:

> "The first phase of this question, is whether the car with the defective coupler, was at the time of the accident, '*in use*,' within the meaning of the amended Act.
>
> It is pointed out that the car was not being hauled at the time of the accident but, was standing upon a switch track for the insertion of a knuckle in a coupling apparatus, and it is con-

tended that it was not then being used within contemplation of the statute.

We think upon the authority of *Johnson vs. Southern Pacific Co.* (196 U. S., 1) that this contention is not well founded. The car with the defective coupler was not withdrawn from use. Although billed to the repair shop, it was not sent there, nor was it sent to any place used especially for making repairs. The insertion of the knuckle was a simple matter. The car was stopped only temporarily and it was intended to couple it to the other cars as soon as repaired.

These facts seem clearly to distinguish this case from those cited in defendant's brief where an accident occurred when cars had been sent to repair shops, or placed upon dead tracks used for repair purposes. * * * We feel it our duty to follow the decision of *Chicago, etc., R. R. Co. vs. Voelker,* 129 Fed., 522. The facts in that case are very similar to those appearing here."

Also the case of *Johnson vs. The Great Northern Ry. Co.*, 178 Fed. Rep., 643, decided by the United States Circuit Court of Appeals, 8th Circuit, March 14th, 1910. An interstate car after being unloaded was placed by the defendant on a switch track when the plaintiff noticed that the air hose had become uncoupled. He tried the lever on one of the cars to raise the pin and it would not raise. He then went between the cars and found the lock-pin down and slightly bent. He again stepped in between the cars and tried to work the pin with his hands. The cars came together and caught and injured him while he was endeavoring to work the pin out. The Court held that the plaintiff was entitled to recover.

The case of *Hohenleitner vs. Southern Pacific Ry. Co.*, 177 Fed. Rep., 796, plaintiff's intestate, a brakeman, was killed in the East Portland yards by going between cars alleging to be used in interstate commerce, for the purpose of coupling them. The couplers were all right but the curve in the track was such that the cars would not pass each other and, as a result, plaintiff was killed.

The act was held by the Court to apply and plaintiff was entitled to recover.

In the case of *Donegan vs. Baltimore R. R. Co.*, decided by the Circuit Court of Appeals, Second Circuit, in 165 Fed. Rep., 870, a train was running about two miles an hour and the plaintiff, a brakeman, ran forward to cut off two cars as ordered. He attempted to use the uncoupling device provided, but it would not work. The chain connected with the top of the coupling pin being broken. Plaintiff was out of sight of the engineer and other brakemen and could not signal them to stop the train. He therefore went between the cars and attempted to raise the pin by hand, but failed to do so and in endeavoring to step out from between the cars, got his foot in an unblocked frog of the switch and was unable to extricate it and he was pulled down under the wheels, thereby receiving his injury.

Plaintiff knew the location of the switch but did not know that the frog was unblocked. The trial Court instructed for the defendant on the ground that the plaintiff was guilty of contributory negli-

gence. The Court of Appeals, speaking through NOYES, *Circuit Judge*, stated among other things:

> "It is contended upon the facts that plaintiff was, as a matter of law, guilty of contributory negligence. We can not so rule without attempting to differentiate between the defense of assumption of a risk, which cannot be set up in an action based upon the 'safely appliance law,' and a defense of contributory negligence.
>
> (See *Schelmer vs. R. R. Co.*, 205 U. S., 1). It is sufficient to say that the question of contributory negligence here, was one for the jury. The duty of the plaintiff was to uncouple the cars. His first obligation was to use the safety appliance. * * * He attempted to obey his order by uncoupling by hand. Under the circumstances, it cannot be stated as a matter of law, that he was guilty of contributory negligence. It was peculiarly within the province of the jury to look into all the facts and circumstances and determine whether plaintiff used ordinary care required of him in carrying out the order which was given.
>
> Negligence is not the only inference possible to be drawn from the facts and its existence could not be determined as a matter of legal knowledge. * * * It was for the jury to determine whether the failure of the defendant to equip cars with the appliances required by the statute, was in view of all the facts and circumstances the proximate cause of the accident. Had the car been properly equipped, there would have been no occasion for plaintiff to go into a place of danger. * * * "

In *Chicago Junction Ry. Co. vs. King*, 169 Fed. Rep., 372, the Circuit Court of Appeals, Seventh Cir-

cuit, affirmed a judgment for plaintiff for injury received while repairing a coupling, by an engine backing up on him, when plaintiff had signaled for the engine to stop.

It was insisted that plaintiff was guilty of contributory negligence. Upon this point the Court of Appeals say:

> "The statute would be honored only in its breach if the same facts that could defeat an employee under the common law rule of assumed risk, can be used to defeat him under the name of contributory negligence. (*Schlemmer vs. R. R.*, 205 U. S.,) * * *
>
> *The engineer, on account of the curve in the track and the other cars,* could not see the opening. Plaintiff *made certain signs to the engineer. Before Judge and jury plaintiff reproduced this pantomime. This is not preserved in the bill of exceptions.*
>
> Defendant, having the burden here, therefore fails to show that there was no evidence from which the jury might warrantably have found that the engineer knew plaintiff was about to replace a broken knuckle and that it would be negligent, if not criminal, to move the train meanwhile. Under the circumstances, plaintiff had the right to assume, unless he had some notice to the contrary that the conductor would not order the train moved and that the engineer would not start it. * * * As to the negligence of the engineer, it is immaterial whether it be taken as that of defendant or of a fellow servant of plaintiff, for defendant cannot be exempted from lia-

bility for its own negligence by reason of the concurrence of another."

Chicago R. R. vs. Ross, 112 U. S., 377; 4 Thompson Com. Neg., Sec. 3858-4856.

We might cite a great many more decisions, but do not deem it necessary to consume the time of the Court with them.

The cases cited by respondent are all clearly distinguishable from the case at bar.

We submit that the statute cannot be abrogated by simply putting a tag on a car and placing it on a train track coupled to other good order cars where employees are constantly shifting and moving good cars.

ASSIGNMENT AS TO MISCONDUCT OF COUNSEL DURING ARGUMENT.

The respondent consumes a considerable portion of its brief in a contention that this cause should be reversed because of the alleged misconduct of counsel at the trial of the cause and, a great array of alleged authorities is cited in support of the contention.

It will be observed that only two or three of the Federal authorities are cited and an examination of these disclose that they are not in point. For fear that our silence might be construed as an admission that there is something in the contention, we deem it best to answer.

The alleged misconduct of counsel, composed of excerpts from a portion of the argument of counsel for plaintiff to the jury, is set out on pages 55 and 56 of the transcript. The entire argument is not set out so as to enable the Court to see the context.

The whole matter is simply this:

Mr. Percy or counsel for the plaintiff, read from a decision of Judge Campbell of the Supreme Court of Mississippi and made some remarks upon this decision. (55). Mr. Trimble, the counsel for the defendant, objected, not to the remarks made, but to counsel "reading any law books to the jury."

Counsel for plaintiff replied, that "he was reading the books to the Court also" and proceeded to read a remark that Judge Campbell had made, "that few if any persons would submit to the injury sustained by the appellee for that sum."

Counsel for the defendant objected to this, as an "improper measure of damages," and, the Court immediately stated that he would tell the jury that it was not the measure of damages. Whereupon counsel for plaintiff stated that he had "called attention to the decision of the Supreme Court of Mississippi because he thought it was entitled to weight but, in view of what the Court had stated and in view of the objection of the exceedingly technical counsel for the company, he would withdraw the remark and request the jury not to consider same." (55).

Counsel for plaintiff then undertook to discuss the Johnson case decided by this Court, wherein this act was first construed and, again counsel for defendant objected to any law being read to the jury, whereupon counsel for plaintiff stated to the Court that if the Court thought it was not pertinent to the case, he would stop. (56).

The Court stated, "it was pertinent to the policy of the law and, that everybody conceded the policy of the law and that he sustained counsel's exception."

Counsel for plaintiff made no further exception and asked no affirmative action of the Court. (See Rec., pp. 55 and 56).

Now, this is all. Yet opposing counsel take up some ten pages of their brief in discussing it and designate it as "misconduct of counsel." There are several answers to this assignment if it should be dignified with an answer.

(1) The record shows that no alleged error of this sort is saved for review, in accordance with the established practice of the Court. Because:

(a) Counsel did not except to the ruling of the Court upon his objection and thereby save his objection for review by this Court. The Court sustained his objection and counsel was apparently satisfied with the Court's action upon the matter.

(b) The record shows that defendant's counsel did not even *object* to the principal remark upon which

he now asks that the case be reversed. He only objected to plaintiff's counsel "reading any law books to the jury." He did not ask the Court to take any action relative to the statement which now seems to be particularly offensive to counsel.

(2) There was nothing improper said or done by associate counsel that could by any warping of construction, be erroneous. His remarks and conduct were entirely legitimate, and not outside of the latitude permissible to an attorney.

(3) Even if the remarks or conduct of counsel were irregular and calculated to improperly bias the jury (and to say they were, is ludicrous) against defendant, such alleged error was cured, first by the interposition and admonition of the trial Judge; second, by the withdrawal of the objectionable language by plaintiff's counsel and his request to the jury to ignore it immediately upon objection by opposing counsel; together with the general charge of the trial Judge on the point.

(4) If error at all, it was more than cured by the remititur of twenty-five ($2,500.00) hundred dollars, made at the suggestion of the trial Judge, on the motion for a new trial.

FIRST: THE QUESTION WAS NOT SAVED FOR REVIEW AND THERE IS NOTHING BEFORE THIS COURT FOR ITS ACTION.

This alleged misconduct of counsel is set out on pages 55 and 56 of the transcript. An inspection of

the entire proceeding called in question, will show that while defendant's counsel did object to counsel's statement, the Court *sustained his objection* and admonished counsel and properly cautioned the jury in the premises. Counsel for defendant *did not except to the Court's action as being insufficient* under the circumstances; neither did counsel invoke any further action from the Court in the matter. There was no motion to exclude; nor request to further caution the jury; nor anything else requested by counsel. The Court was not put in error. Plaintiff's counsel himself withdrew the remarks and asked the jury not to consider them. And defendant's counsel was evidently satisfied at the time for he asked nothing further. There is therefore nothing presented to this Court for review. The trial Judge cannot be put in error for failure to rule on a matter which has never been presented for his decision or decided by him. He ruled on the objection and if the defendant's counsel was still dissatisfied, it was his duty to invoke further action and if the Court disallowed it *then to except to the Court's action* and thereby save the question for review. Not having done this, there is nothing before this Court. It will not suffice to simply object. That but challenges the Court's attention to the alleged error or misconduct. The Court's *ruling must be regularly excepted to* and the exception preserved, else the Court's action will be deemed satisfactory.

This is the well established rule of practice in this Court as well as in the Circuit Court of Appeals. The

question is reviewed at some length in the recent case of *Cudahy vs. Skamonnal,* 125 Fed., 477, 60 C. C. A., p. 313. Upon this precise question the Court says:

"* * * The correct method of bringing a question of this sort before an Appellate tribunal for review is to make a seasonable objection to the improper remarks of counsel when they are made, or to an improper line of argument when it is adopted, thereby challenging the trial Court's attention to the subject; *and by taking an exception to the Court's action, if the objection is overruled, and by incorporating the exception, together with a statement of the remarks complained of or the line of argument* pursued in a bill of exceptions, signed and sealed by the presiding Judge. This method of practice *has been approved by the Supreme Court of the United States in Crumpton vs. the United States,* 138 U. S., 351, where the Court says:

'* * * nor was the Court requested to caution the jury against its force and *no exception appears to have been taken.* There is no doubt that, in the excitement of argument, counsel do sometimes make statements which are not fully justified by the evidence. This is not such an error, however, as will necessarily vitiate the verdict, or require a new trial. It is the duty of defendant's counsel at once to call the attention of the Court to the objectionable remarks and request its interposition and in case of a refusal, to *note an exception.* Thompson on Trials, Sec. 962.'

'The same method of procedure has been adopted and approved in other jurisdictions, and it would seem to be entirely reasonable to require counsel for the complaining party to call

the attention of the trial Judge to remarks made by opposing counsel or to a line of argument made by him, which is deemed to be improper, and to invoke the interposition of the trial Judge, and *to save an exception to his action in the usual way,* provided he refuses to condemn the action of the opposing counsel or arrest the line of argument; or to grant *other suitable relief. Bradshaw vs. The State,* 17 Neb., 147; *McLean vs. States,* 18 Neb., 154; *State vs. Taylor,* 118 Mo., 154; *Rudolph vs. Landwelin,* 92 Ind., 34; *Dowdell vs. Wilcox,* 64 Iowa, 721; *Learned vs. Hall,* 133 Mass., 417; *Roeder vs. Stott,* 12 Mo. App., 566.'

* * * but when remarks are made by counsel or arguments are advanced that are deemed to be so far improper and prejudicial to the interests of a party that his counsel resolves to assign them as grounds for reversal by an appellate tribunal, he should at least challenge the attention of the trial Judge to the matter, *and if, adequate relief is not afforded, should thereupon save an exception and incorporate it in the bill of exceptions.* The bill of exceptions fails to show that this was done in the present case. The remark should not have been made by counsel and we feel free to condemn it. The trial Court in the exercise of its discretion, might have set aside the verdict and granted a new trial because of the language complained of. He did not see fit to do so, however, and his action in this respect indicates, we think, that, in the opinion of the trial Judge, the remarks which were made did not prejudicially affect the rights of the defendant company. This Court is in an entirely different situation. The judgment *below is presumptively right, and we cannot disturb it except*

for an error of law committed by the trial Judge, on account of which an exception was duly taken and saved during the progress of the trial."

In *Lunford vs. Dietrich*, 93 Ala., at page 572, the Court says on this point:

"Plaintiff's counsel in his argument to the jury, stated that his client's character had been damaged by the arrest and charge of larceny preferred by defendant, and that he was entitled to be indemnified in damages. The defendant, the bill of exceptions recites, excepted to this remark, because no such damages were claimed and no proof offered to sustain the claim. The Court did not exclude the remarks and counsel did not withdraw them. Was there any motion to exclude them? Was there any action of the Court invoked or had with respect to them? Clearly not. All that was done as appears from the bill of exceptions, was the *noting of an exception to certain language of counsel. Nothing that the Court relied upon or did, or said,* is presented for review; and the functions of this Court in its appellant character are strictly confined to the actions of trial Courts upon questions that are presented to and relied upon by them. If the statement was improper, of which we are by no means convinced, the presumption is, that it would have been excluded and the jury duly cautioned against being influenced by it, had the attention of the trial Judge been called to it and its action invoked upon it; and we can not put him in error for failure to rule on a matter which has never been presented for his decision, or decided by him."

In the case of *R. R. vs. Curb,* 66 Fed., 519, the Circuit Court of Appeals for the Eighth Circuit makes use of the following forceful language:

> "In recent years the reversal of cases for supposed improper remarks of counsel has sometimes been carried to very extravagant lengths. The grounds upon which rulings are supported are: First, that it is the duty of the Court, by such discipline, to compel lawyers to conform to a high and elevated standard in the advocacy of their client's causes; and, second, that juries are composed of ignorant credulous men, who will believe every false, fallacious, or extravagant statement of counsel, unless they are admonished by the Court not to do so. An elevated standard of advocacy on the part of the bar is certainly desirable, but if any one is to be punished for falling below the ideal standard, it should be the lawyer, and not his client. By the time the questionable arts of the advocate, which are practiced to persuade and delude the Judge as well as the jury, are eliminated from the profession, there will be little use for lawyers; the millenium will have come. The assumption of the Courts that jurors are so weak, ignorant, and inexperienced as to fall an easy prey to the arts of the unscrupulous counsel is a grave error. They are as little liable to be played upon by false logic and misrepresentations of the evidence as the Judge on the bench. There is no occasion for a refining machine at their elbow to sift the false from the true in the evidence, or detect chicanery, falsehood, or fallacy in the argument of counsel. The jurors are quite as able to protect themselves from such influences on the facts of the case as the Court is on the law, and every ruling which proceeds upon the idea that juries

are destitute of common sense, unacquainted with the affairs of the world, and ignorant of the arts and methods of lawyers, is unsupported by fact or experience. A trial has relation to a dispute between the parties to the suit, growing out of their acts or contracts. It commonly concerns the ordinary affairs of life. It should not, therefore, be a mysterious or refined proceeding. It ought to be a very practical thing and within the comprehension of men possessed of common sense and practical knowledge of the affairs of life; and, when properly conducted, it is so. Whenever a trial is conducted on any other theory there is apt to be a miscarriage of justice. A verdict ought not to be set aside because the winning party did not have an ideal lawyer to argue his cause, or on the false assumption that the jury was destitute of common sense, and had such slight knowledge of the methods of lawyers as to fall an easy prey to their fallacious or false suggestions. But, however this may be, the trial Judge, who hears and sees all that occurs at the trial, is in a much better position than the Appellate Court to determine whether he should interfere because of alleged improper acts or remarks of counsel.

It is a matter relative to the decent and orderly conduct of the trial, and, as such, within the sound discretion of the trial Court; and it is only when such discretion has clearly been abused, to the prejudice of the complaining party, that the Appellate Court will interfere."

If the Court require any further authority on this point the following cases with citations will be found to hold the same doctrine. In each of these cases, defendant's counsel objected to the argument when

made, and stopped at that. They did not except to the Court's ruling, or seek to have the language excluded, or invoke any further action from the Court. They were precisely like the case at bar in that respect and the question was held not saved for review:

U. S. vs. Alexander, 119 Fed., 1015; 46 Cent. Dig., Sec. 312, p. 1102 et seq.
Lunsford vs. Diestritch, 93 Ala., 572.
Quincy Gas Co. vs. Bauman, 213 Ill., 298.
R. R. vs. Sullivan, 165 Ill., 305.
Cropsey vs. Averhill, 8 Neb., 160.
Whaley vs. Vaunatta (Ark.) 91 S. W., 191.
Fitzgerald vs. Fitzgerald, 16 Neb., 415.
Lumber Co. vs. Hauley, 116 Ill. App., 358.
R. R. vs. Moore, 110 Ill. App., 306.
Matts vs. Borba, 37 Pac. Rep. (Cal.), 161.

However, there was nothing improper in the statement or conduct of counsel. Counsel granted that the jury were prejudiced, first, by plaintiff's counsel referring to the rule of practice in the trial Court with respect to "remitting large verdicts"; and, second, to the remark going to the measure of damages (that the jury consider how "they would be effected"). The alleged misconduct will be briefly analyzed: First, with reference "to the practice of remitting," the whole affair, as shown by the record, page 60, is as follows:

During the argument, Mr. Percy (of counsel for plaintiff), said:

> "I have here a decision by Judge Campbell, of the Supreme Court of Mississippi, where the facts are similar to these. The plaintiff in this

case (referring to the opinion in the book he was reading) was very badly hurt, and it was urged that the verdict was excessive, that the amount was unreasonable, and that the Court ought to remit it—that is the practice, I believe, in this Court, if a large verdict is given—the Court ought to remit or grant a new trial.

MR. TRIMBLE: I submit that your Honor will give the jury all the law they require on that subject, and I *object to Mr. Percy reading any law books to the jury.*

MR. PERCY: I am reading them to the Court also.

THE COURT: It isn't proper to read facts to the jury." * * *

It will be observed that opposing counsel *did not object to the remarks made by Mr. Percy relative "to the practice in the trial Court" being to remit large verdicts to a proper amount."* The Court's attention was not challenged to this remark nor was any action in any way invoked upon it. On the contrary, counsel's objection was specifically to Mr. Percy's *"reading law books to the jury;"* and that is what the Court admonished counsel about. Although counsel did not even object to the remark of counsel (much less invoke the Court's action in the premises). They now undertake to assign it as error and practically base their entire argument under this assignment, upon this remark of plaintiff's counsel. (See defendant's brief, pages 31 to 40). It goes without saying that he cannot now be allowed to assign as an error something that he did not even object to. The remark was not deemed of sufficient importance by de-

fendant's counsel at the time to call forth an objection, and it is doubtful if it could be relied upon as an error in the motion for a new trial. Certainly, it could not thereafter be raised. This disposes of the backbone of the alleged misconduct.

Passing to the other "improper (?) argument and conduct (?)" we find it to be as follows (Rec., p. 56): Following the aforesaid colloquy, the following occurred: (The Court had ruled that counsel should not read the facts from the law books):

> "MR. PERCY: I am not going to read any facts. In considering the reasonableness of this verdict, Judge Campbell in this opinion said, 'we apprehend that but few if any persons, would submit to the injuries sustained by appellee for that sum.' In other words, consider how you might be affected yourself.
>
> MR. TRIMBLE: I object to that as an improper measure of damages.
>
> THE COURT: Of course, the Court will tell the jury that is not the measure of damages. If counsel desires to make that kind of statement the jury will hear it and then the Court will tell them what the law is, as he understands it.
>
> MR. PERCY: I called attention to these decisions as being of weight, but in view of what the Court has said and in view of the objection of my exceedingly technical friend, lest some error may creep into this record by reason of the objection, I withdraw the remark, Gentlemen of the Jury, and request you all not to consider it."

We submit that there is no error here, even if it were properly before the Court for review. Plaintiff's

counsel was not insisting upon making an objectionable argument after the prior objection. The Court had suggested in his action on the former objection "that counsel read no facts to the jury." Counsel read no facts to the jury. Counsel was obeying the Court and simply read an excerpt from the legal opinion of Judge Campbell. Plaintiff's counsel was not permitted to finish his sentence, viz.: ("In other words consider how you might be affected yourself—)" by adding these words, "for there is no accurate way of measuring the value of pain and suffering and no way of even coming at it at all, except by comparing it with your own feelings under similar circumstances." This would not have been error, because one of the elements and a large one, in the case at bar, for the jury to pass upon, was the value of the pain and suffering endured and a juror can get at the value of pain in no other way. At all events it could not have been material error, under the circumstances.

There was no error in reading excerpts from decisions in similar cases.

Hastings vs. The R. R. Co., 53 Fed., 225.
B. & O. R. R. Co. vs. Kean, 65 Md., 394.
Ransome vs. Christian, 56 Ga., 35.
Ransome vs. Christian, 56 Ga., 35.
Kean vs. Detroit Copper Co., 66 Mich., 277.
Sprague vs. Craig, 51 Ill., 288.

It must be borne in mind that the Court ordered counsel to present their law along with their argument and in the presence of the jury. (54).

The Court said (Rec., p. 54): "You may proceed with your argument on the law and facts and I will pass on the motion at the conclusion of the argument." This was mutually agreeable.

There was no misstatement of the evidence nor any appeal to passion and prejudice. Everything said was pertinent to the issues and legitimate deduction.

If isolated fragments of counsel's argument would work reversals without the context, or argument of the other side, regardless of the manner in which it was said, lawsuits would be mere shuttles playing back and forth between the Appellate and Trial Courts.

However, if the statements of counsel were technically improper they have been abundantly cured. (55). The Court at once instructed the jury not to consider counsel's statement as the measure of damages and counsel for plaintiff withdrew the remarks, at the same time, asking the jury himself not to consider them.

The trial Court then charged the jury fully and succinctly upon the measure of damages. (Rec., p. 58). In fact, the charge was exceptionally clear and emphatic upon this point, and after charging the measure of damages, in such a manner that a child could understand it, the learned Court said:

> "You should not permit any prejudice or passion that you may entertain to interfere, or to influence your consideration of the case, one way

> or the other. Try this case as between man and man. The fact that one party is a laboring man, a poor man, on one side, and that the other is a great corporation, should not affect your verdict one way or the other."

We submit that the argument, even if improper, was thereby rendered innocuous.

Everything that human agencies could do was done, to rectify and counteract any possible harm from the statements.

The cases cited by opposing counsel are all different, and a great deal different, from the case at bar. If the decisions cited in support of counsel's contention are carefully read, it will be found that none of them are in point with this case. The arguments in the cases cited were gross breaches of propriety and calculated to stir up passion and prejudice. No authority can be found that would justify a reversal for counsel's conduct in the case at bar.

Where the trial Court in response to an objection for improper argument, admonishes counsel making the argument, cautions the jury and charges them the law upon the matter in a lucid manner; and where this is reinforced immediately after the objection, by a withdrawal, by counsel, of the language and a request to the jury not to consider it, and no appeal to passion is involved—the decisions are practically all one way, that the error is cured or rendered harmless.

46 Cent. Dig., Sec. 316, pp. 1108 to 1116.
Traiger vs. R. R. Co., 93 Ala., 45.
Cavenessee vs. R. R. Co., 48 Ark., 106.
Kennedy vs. Sullivan, 34 Ill. App., 46.
Erb vs. Ins. Co., 98 Iowa, 606.
Sinclair vs. Stanley, 69 Texas, 718.
Booth vs. Pullman Co., 28 S. W., 719.
Hinton vs. R. R. Co., 65 Wis., 323.
Daugherty vs. R. R. Co., (Pa.) 62 A., 926.
Smith vs. R. R. Co., 89 S. W., 674.
Avis vs Mo. R. R. Co., 91 S. W., 877.
Day vs Ferguson, 85 S. W., 771.
McDonald vs. R. R. Co., 85 S. W., 493.
Schwartz vs. McQuaid, 214 Ill., 357.
McKee vs. St. Louis Transit Co., 108 Mo. App., 470.
Sammon vs. Amer. Canning Co., 6 Ohio C. C., (N. S.), 121.
Carthey vs. Ft. Smith Lbr. Co., 86 S. W., 806.
Crosson vs. R. R. Co., 87 S. W., 867.
Miller vs Nuckolls, (Ark.) 91 S. W., 759.
Herbert vs. R. R. Co., 115 Ill. App., 248.
Sanders vs. R. R. Co., (Ky.) 92 S. W., 937.
Hollis vs. R. R. Co., 91 S. W., 258.
Taylor vs Woodmen, (Wash.) 84 P., 869.
Yarns vs. R. R. Co., 77 N. E., 64.
Bennett vs. Susser, (Mass.) 77 N. E., 884.
Rice vs. Dewberry, 93 S. W., 785.

We submit that the judgment in this case is just; that the judgment of the Court of Appeals will be reversed and the judgment of the trial Judge affirmed.

Respectfully submitted,

T. F. KELLEY,
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LUTHER WALTERS,
Attys. for Delk.

Supreme Court, U. S.
FILED.
NOV 14 1910
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 88.

E. M. DELK, PETITIONER,
v.
ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT.

W. F. EVANS,
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Attorneys for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 277.

E. M. DELK, PETITIONER,
v.
ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The petitioner E. M. Delk, instituted on the first day of November, 1906, in the Circuit Court of Shelby

County, Tennessee, his suit to recover damages for a personal injury sustained by him while endeavoring to couple two freight cars of the St. Louis and San Francisco Railroad Company in its yards at Memphis, Tennessee. On the Railroad Company's petition the suit was removed, on the ground of diversity of citizenship, to the Circuit Court of the United States for the Western Division of the Western District of Tennessee, wherein a trial was had, resulting in a verdict in favor of the plaintiff for $7,500.00. A *remittitur* was entered in that court for $2,500.00, and a judgment for $5,000.00 was rendered. The case was brought to the United States Circuit Court of Appeals for the Sixth Circuit on writ of error, and upon the suggestion of the Interstate Commerce Commission that the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174) was involved, and upon its request and the assent of the defendant in error, that Court permitted special counsel for the Government to participate in the argument at the hearing and be heard upon the question of the construction and application of said Act. The judgment was reversed; two motions for rehearing were overruled, and a petition for a writ of *certiorari* from this Court directed to the United States Circuit Court of Appeals of the Sixth Circuit was made, the Attorney General joining therein, and granted.

The statement of facts made by the United States Circuit Court of Appeals for the Sixth District is a concise statement of the evidence, and is as follows:

> "The car alleged to be defective was what is known as K. C. F. S. & M. No. 21,696. The car was loaded with lumber consigned from Giles, Ark.,

to Memphis, Tenn. The car arrived in Memphis September 28, 1906, at 4:30 P. M., and was delivered by the plaintiff in error to the Union Railway Company of Memphis, commonly called 'The Belt Line,' October 2d, for delivery to the consignee. The car was returned to the plaintiff in error by the Union Railway Company of Memphis, October 3d, at 7:30 a. m., on account of there being a defect in the coupling and uncoupling appliance on one end of the car. The car was in a string of nine cars on what is known as the 'dead track' in defendant's new yard. This dead track was a team track; that is, the track was so arranged that teams might load from or into the car into or from wagons hauled alongside the car.

"On the morning of October 4, 1906, defendant in error, acting under instructions of the plaintiff in error, undertook to switch certain cars out of the string of nine cars so as to get two empty cars and three coal cars for removal to some other portion of the defendant's line. The cars were on a track extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The easternmost two cars, being empties, were left on the lead track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but, owing to a defect in the coupler on the eastern end of the two cars at-

tached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C. F. S. & M. No. 21,696 was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock pin or lock block. The drawbar also had a lateral motion of four inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers would couple by impact. In so doing, his foot was badly injured. Plaintiff in error had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt Railway on account of the defect in the coupler, plaintiff in error's inspector placed a red card about three inches by six inches upon the car, and with a blue pencil wrote on said card, 'Out of order.' This card is what is commonly known as a 'bad order' card. The car had been on this team track from 7:30 a. m., on the 3d until 10 or 11 o'clock on the 4th, when the accident to defendant in error occurred.

"There was evidence tending to show that the inspection was made in the latter part of the 3d, and that the inspector thereupon ordered an employe to go to the repair shops which were some two and a half miles distant and get the material for repairing the coupler, but that the employe did not return until after the accident. The trial court held that the safety appliance act applied to the car with the defective coupler, and that by virtue of section 8 of said act plaintiff in error was denied the defense of assumption of risk on the part of defendant in error, and stated the language of the act to the jury."

To this may be added the further fact that at the time plaintiff attempted to couple the cars they were on a curve, he had two or three times attempted to effect the coupling by pushing the defective coupler with his hands, and in each instance the coupler had jumped toward him at the moment of the impact.

Three questions were considered by the Circuit Court of Appeals, namely, First: Was the car upon which the defective coupler was located in use in interstate commerce contrary to law at the time of the injury? Second: The defect being shown and an injury having occurred, was the liability of the Company absolute without any regard to whether or not it was possible for defendant in the exercise of ordinary care to have discovered and remedied the defect before the injury occurred? Third: Does the record show that plaintiff was guilty of contributory negligence as a matter of law?

It was held by a majority of the court that the car was in use in interstate commerce at the time of the accident. Judge Lurton, however, in a separate opinion, stated that he could not agree that the car was so clearly in use contrary to the provisions of the Act as to take that question from the jury. With respect to the second question, the majority of the Court, (Judge Richards dissenting), were of the opinion that while the Act imposed upon the carrier the absolute duty of equipping its cars with proper couplers in the first instance and to thereafter keep them so equipped, yet the carrier is only required to use reasonable care after the cars have been so equipped to keep such couplers in repair. No opinion was expressed upon the evidence

with respect to the third question involving the contributory negligence of the plaintiff.

The specifications of error assigned by (then) plaintiff in error in the Circuit Court of Appeals, and relied upon, are as follows:

SPECIFICATIONS OF ERROR.

I.

There was error in the court's refusal to direct a verdict for defendant.

(1) Because no negligence of defendant was shown;

(2) Because the Safety Appliance Act was inapplicable to the facts shown in evidence;

(3) Because said act not being applicable, the plaintiff knowing of the defect in the coupler, assumed the risk incident to making the coupling;

(4) Because the plaintiff was guilty of negligence as a matter of law.

II.

There was error committed by counsel for plaintiff in arguing the case to the jury in appealing to the jury to make the verdict large enough because of the power of the court to reduce it, if too large, but no power to increase it if too small; and in reading law books to the jury from which to deduce such improper argument and in otherwise improperly arguing the case to the jury, all without rebuke from the court.

III.

Because the court erred in the charge given to the jury excepted to at the time, as follows:

"Now, the Act of Congress under which the plaintiff seeks to recover in this case and on which he founds his cause of action is known, as I said before, as the Safety Appliance Act, and that law provides that on and after the 1st day of January, 1898, it shall be unlawful for any common carrier, that means any railroad engaged in interstate commerce, to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of going between the ends of the cars. That act also provides that any employe of any common carrier who may be injured by any locomotive car or train, in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge.

"In this case there is no question, so far as I have heard raised, as to the fact that this defendant company is a railroad engaged in interstate commerce, hauling interstate traffic. There is a question made as to whether or not this car that had the alleged crippled coupler was a car being used in hauling of interstate commerce within the meaning of this act. I think for the proof, gentlemen of the jury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident, and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and

that proposition is not disputed, whether or not the company is liable under the facts of the case."

IV.

Because the court erred in the charge given to the jury and excepted to at the time, as follows:

"If you conclude that he did that as a reasonably prudent man with his experience and his observation and the facts and circumstances in the case as I have detailed or undertook to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct in the manner in which he attempted to couple that car, was such that a reasonably prudent man situated as he was under all the facts and circumstances that surrounded him there would not have attempted to do it, and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence, and that negligence, if you believe it was the proximate cause of the injury, would be such as to bar him in this action and that question I leave to you entirely without intimating any opinion about it.

V.

The court erred in saying to the jury on exception taken to the following paragraph of the charge, the following:

"No, that's not the statement I intended to make; I withdrew the proximate cause; I was going on

another idea; what I said to the jury was, or what I intended to say and will say now, that if you believe from all the testimony in the case that this accident was caused by the negligent conduct of the plaintiff in the manner in which he intended to make that coupling, that would bar him from recovery."

ARGUMENT.

I.

Was the Car upon Which the Defective Coupler was Located in Use in Interstate Commerce Contrary to Law at the Time of the Injury?

Section 2 of the Safety Appliance Act (Act, March 2, 1893, chap. 196) provides:

> "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 8 of the Act provides:

> "That any employe of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this Act shall not be deemed thereby to have assumed the risk thereby occasioned although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

The car in question was billed from Giles, Arkansas, to Memphis, Tennessee. On October 2, 1906, it was sent from defendant's line to the Belt Line at Memphis for delivery to the consignee, the transfer being made by Foreman Delk, plaintiff herein. The Belt Line declined to receive the shipment on account of a defective coupler, whereupon the car was returned to de-

fendant, inspected by it, and placed on its "dead track" for repairs. (Transcript Record, pp. 22, 23.)

In discussing this proposition Judge Severens said (158 Fed. 931, l. c. 933):

> "The question which seems first in order is one raised by the plaintiff in error, and is whether the car to which the defective coupling was attached was at the time of the accident employed in interstate commerce. The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for the delivery to the consignee wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and was being hauled upon its tracks when the accident occurred. Johnson v. Southern Pacific Co., 196 U. S. 1; 25 Sup. Ct. 158, 49 L. Ed. 363; Chicago, M. & St. P. Ry. Co. v. Voelker, 129 Fed. 522; 65 C. C. A. 226; 70 L. R. A. 264."

Judge Lurton did not concur in this conclusion, his views being as follows: (158 Fed. l. c. 939).

> "I entirely concur in the conclusion of the court, and the interpretation given to the Car Coupler Act, but I cannot agree that this car was so clearly "in use" contrary to the provisions of that Act, as herein interpreted, as to take that question from the jury. I think the stoppage of this car on the dead track was not in any true sense an incident of its transportation in interstate traffic. True its journey was not finished, but its further journey had been stopped because the next carrier refused to receive it with this defective coupler. There was evidence tending to show that it was not a case of a

temporary stoppage, such as that in Johnson v. Southern Pacific Company, 196 U. S. 1, but a withdrawal from all use in any kind of traffic until it could be repaired. It was placed on a track where cars needing only light repairs were ordinarily placed and was tagged as in "bad order." There was also evidence tending to show that the effort to couple this car was solely for the purpose of holding the car, against gravity, in its place on this track until it could be repaired. A car withdrawn from its journey and held upon a dead track to be repaired is not in my judgment "a car in use" contrary to the provisions of the Car Coupler Act any more than a car in a shop awaiting repairs. In Johnson v. Sou. Pac. Company, before cited, the dining car having a defective coupler had not been withdrawn from its journey to be repaired. Its stoppage was one usual and incident to its journey and that it might be returned over its usual route in the ordinary course of the kind of interstate commerce it was habitually engaged in. No question of withdrawal from traffic for the purpose of repairs was in that case. The point decided is well shown by the Chief Justice, where he says:

" 'Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law.' "

The facts are quite like those recently considered by the Court of Appeals of Tennessee, not yet reported, in the case styled McLaughlin v. Union Railway Co., where that court held that a car withdrawn for repairs was not a car in use contrary to the Act and the movement of such a car necessary to getting it into the shops was not a use which brought the car within the Car Coupler Act. See also Railway

> v. Bowles, 71 Miss. 1003 and Taylor v. Boston Railway, a Massachusetts case, 74 N. E. Rep. 591, being cases under state laws similar in character and presenting in each the question of whether a disabled car being handled as a "bad order" car for purposes incident to repair was a car engaged in service."

The case of Johnson v. Southern Pacific Company, 196 U. S. 1, was cited by Judge Severens in support of his conclusion. Judge Lurton pointed out the distinction between that case and the case at bar. Judge Lurton's view that the car was not in use contrary to the provisions of the Act is fully supported by the evidence, and is not out of harmony with the Johnson case. *There*, the car was placed on a side track preparatory to being attached to a passenger train for further service without repairs being made, or intended to be made; *here*, the car was placed on a side track in order that it might thereby be withdrawn from further service for repairs. *There*, the intention to continue the car in use was manifest; *here*, the intention to discontinue the use was manifest. *There*, service inconsistent with withdrawal from the provisions of the Act was intended; *here*, repairs inconsistent with use under the provisions of the Act was intended. *There*, the Act was ignored; *here*, compliance with its terms was sought.

It is true the car was freighted with interstate commerce and had been and was to be used in transporting its cargo on an interstate journey, but we respectfully urge that at the time plaintiff was injured it had been effectually, if temporarily, withdrawn from that service, and in the language of Judge Lurton was not "a car in

use contrary to the provisions of the car coupler Act any more than a car in a shop awaiting repairs."

In addition to the Johnson case Judge Severens cited, in support of his conclusion that the car was at the time of the accident employed in interstate commerce, C. M. & St. P. Ry. v. Voelker, 129 Fed. 522; 65 C. C. A. 226. The facts in that case parallel the facts in the Johnson case, and are materially unlike the facts in the case at bar. In the Voelker case the car was on a yard track at Dubuque and "was to form a part of a train then being made up .... for early movement." (Judge Van Devanter's statement of facts at page 524.) In the opinion Judge Van Devanter states, at page 528:

> "We think there was evidence that the carriage or movement of the coal with which the car in question was loaded had not terminated, and that the car was still actually in transit. The evidence contains no suggestion that the car had reached the end of its journey, or that it was to remain indefinitely or for any considerable time on the track where it was at the time of the injury, or that the coal was to be unloaded there. The inference to be reasonably drawn from the evidence is that the car was then to actively continue the journey toward the ultimate destination of the coal which it was carrying."

Neither the Johnson case nor the Voelker case therefore can be interpreted as sustaining Judge Severens' conclusion that the car at the time plaintiff was injured was in use in violation of the Act, but both of those cases by strong implication, if not in terms, support Judge Lurton's views. A question of fact was at least presented by the evidence requiring a finding by the jury, and the following portion (Trans. Rec. p. 57) of the charge was erroneous, namely: "There is a question made as

to whether or not this car that had the alleged crippled coupler was a car being used in hauling of interstate commerce within the meaning of this Act. I think for the proof, gentlemen of the jury, that it was a car that was being used in the hauling of interstate commerce or commodities at the time of the accident, and so the only proposition left for you to determine is whether or not, if you find this man was hurt, and that proposition is not disputed, whether or not the company is liable under the facts of the case."

II.

THE DEFECT BEING SHOWN AND THE INJURY HAVING OCCURRED, WAS THE LIABILITY OF THE RAILROAD COMPANY ABSOLUTE WITHOUT REGARD TO WHETHER OR NOT IT WAS POSSIBLE FOR THE COMPANY IN THE EXERCISE OF ORDINARY CARE TO HAVE DISCOVERED AND REMEDIED THE DEFECT BEFORE THE INJURY OCCURRED.?

The Act is entitled "An Act to Promote the Safety of Employes and Travelers upon Railroad by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes, and their Locomotives with Driving Wheel Brakes, and for other purposes."

Section 2 provides—

> "That on and after the first day of January, Eighteen Hundred and Ninety Eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 6 provides—

> "That any such common carrier using any locomotive engine, running any train or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty, etc."

Section 8 provides—

> "Any employe of any such common carrier who may be injured by any locomotive, car or train, in use contrary to the provisions of this Act, shall not be deemed thereby to have assumed the risk thereby occasioned although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

Plaintiff contended below that the duty to keep the coupler in repair at all times was co-extensive with the duty to equip the car with the coupler prescribed by the Act, namely, an absolute duty. The railroad company contended that having complied with its duty to so equip the car, and having kept it so equipped, it was only required to exercise due diligence in endeavoring to keep it in good order. The Court concurred in the railroad company's view and held that the jury should have been permitted to determine whether or not the company was negligent in respect of that duty.

The title of the Act speaks the intent of Congress in its passage to have been to promote the safety of employes and travelers by requiring cars to be equipped with automatic couplers. The duty to equip is absolute. The expected and natural result of a compliance with this absolute duty is to promote the safety of employes and travelers. The second section of the Act forbids the

use of a car not so equipped. Such use constitutes the offense. The existing condition sought to be remedied by the Act was that cars were not equipped with automatic couplers but with (generally) link and pin, the adjustment of which necessitated the presence of employes between the cars. Of this condition the legislative mind was cognizant, but not more so than of the fact that breakages and disrepair of equipment are and will remain necessarily incident to the operation of railroads. With respect to the former system railroads were required to exercise only that reasonable degree of care and diligence in keeping the equipment in repair which was proportionate to the danger of their use.

From what language of the Act can it be reasonably inferred that an improved equipment imposes an absolute duty to keep that equipment in perfect repair irrespective of admitted liability to accidents?

In considering this question, Lewis, J., in United States v. A. T. & S. F. Ry. Co., 150 Fed. 442, aptly says "the act was passed for practical purposes. It does not assume the impossible and lay a forfeiture against the laws of nature; for couplers must break." Any other construction would require a railroad company to insure against the breaking of that which practice and experience show cannot be used and operated without breaking.

The new and absolute duty to equip having been complied with, the old duty to exercise proper care to keep the new equipment in repair remains, and that we believe to be the reasonable construction of the Act. In harmony with the opinion of the Circuit Court of Appeals, and cited therein, in addition to United States v. A. T. & S. F. Ry. Co., 150 Fed. 442, above quoted from,

are Voelker v. C. M. & St. P. Ry. Co., 116 Fed. 687; United States v. I. C. R. Co., 156 Fed. 185; Elmore v. Seaboard Air Line R. Co., 130 N. C. 506; 41 S. E. 786; and Missouri Pacific Ry. Co. v. Brinkmeier (Sup. Ct. Kans.) 93 Pac. 621. To these may be added, United States v. A. T. & S. F. Ry. Co., 170 Fed. 542.

In the petition of the United States for leave to be heard herein, the Attorney General refers to Johnson v. Southern Pacific R. Co., 196 U. S. 1. We do not see in what respect that case is applicable to the case at bar. In the Johnson case a coupling was sought to be made between an engine equipped with a Janney coupler and a dining car equipped with a Miller hook, two appliances used in interstate commerce, but which would not couple automatically by impact. This was held to fall short of compliance with the Act. The question here presented was not considered in the Johnson case.

The Attorney General further refers to St. L. I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281. As the latter case has been interpreted by various lower courts as imposing an absolute duty upon a railroad company to at all times keep its equipment in perfect repair, it becomes pertinent to consider whether that case does in fact so decide.

It will be observed that Taylor was injured while attempting to make a coupling between two cars in continuous use in interstate commerce. The section of the Act involved in the Taylor case was Section 5, which reads as follows:

> "That within ninety days from the passage of this Act the American Railway Association is authorized hereby to designate to the Interstate Commerce

Commission the standard height of drawbars or brakebars measured perpendicularly from the level of the top of the rails to the center of the drawbars for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners or lessees, engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said Association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

With reference to this section, the Court says:

> "If the railroad company does in point of fact use cars which do not comply with this standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

The difference in the language employed in Sections 2 and 5 will not be overlooked. Section 5 does not provide for the *equipment* of cars with drawbars of any particular type, but is intended to apply to drawbars of any kind which may be used. It did not require any *change* of equipment. It will be noted that according to its terms this section was to become effective July 1, 1895. Its plain purpose was merely to regulate the height of

the drawbars, and this it does in unequivocal terms. Section 2, however, provides for a change of equipment, and according to its terms was not to become effective until January 1, 1898. It was not necessary in the Taylor case to place any construction upon Section 2 of the Act, as that section was not involved.

In the Taylor case the railroad company contended that if it furnished drawbars of standard height and thereafter provided devices called "shims" to be used by employes in raising or lowering drawbars which through use had varied from the established standard, that thereby the railroad company had performed its full duty under the Act. It will thus be seen that the railroad company in the Taylor case attempted to delegate to its employes the duty of preserving the standard height of its drawbars by use of "shims", and sought to shield itself from liability under the Act by invoking negligence of the employe charged with that duty; in other words, a car with a drawbar not meeting the required standard was continued in use on the theory of an employe bringing it to the required standard by a method not provided for in the Act. That such was the railroad company's contention is made manifest by the following language of the court:

> "On this state of the evidence the defendant was refused instructions in substance, that if the defendant furnished cars which were constructed with drawbars of the standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and if the lowering of the drawbar resulted from the failure to use the shims that was the negligence of a fellow servant for which the defendant was not responsible."

It was to this contention of the railroad company that the language next following in the opinion was addressed. The railroad company was continuing to use these cars relying upon its employe to remedy the defect, and it was with respect to this action of the railroad company that the court said "it is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard' ".

In support of this construction of the Taylor case the following language quoted from United States v. Illinois Central R. Co., 170 Fed. 542, l. c. 546, 547, is not inapplicable:

> "The instruction given to the jury in regard to the measure of the duty imposed upon the railroad company by the provisions of the Safely Appliance Act was in the main, but not altogether, substantially in accord with the instruction which we gave to them in the case of St. L. & S. F. R. Co. v. Delk, 158 Fed. 931; 86 C. C. A. 95. It is alleged, however, by counsel for the Government that our opinion in that case has been overruled by the opinion of the Supreme Court in the case of St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. 616; 52 L. Ed. 1061. If this seemed to us with certainty to be so we should of course be bound to yield our own opinion to the superior authority of the court. But if the judgment of the Supreme Court has not concluded the question now presented, we think the duty incumbent upon this court is to follow its own decision, unless, indeed, it should become convinced that it was wrong. Thereupon it will remain for the Supreme Court to determine whether the ruling it has announced is to be extended to facts such as those of the present case. * * * We gather from the facts stated in the opinion in the Taylor case that the defect in

> the couplings of cars existed when the cars started on their journey and that plates of metal called shims were provided for temporarily remedying the inequality in the height of the drawbars. If that was so the railroad company was chargeable with notice of the defective condition of the drawbars when the cars were sent out and was at fault in not putting them in order, and did not relieve itself by trusting to its employes the making of the temporary make shifts."

The defendant here therefore respectfully urges that the Taylor case is not conclusive of the liability of defendant in the case at bar.

III.

Does The Record Show That Plaintiff Was Guilty of Contributory Negligence as a Matter of Law?

This question was not decided by the Circuit Court of Appeals, but was disposed of (158 Fed. 931, 939) in the following manner:

> "The court below instructed the jury in substance that it was competent for them to find that the plaintiff below was guilty of contributory negligence, and if they did that he was not entitled to recover. But the railroad company insists that the evidence was so clear and positive that the court should have given a peremptory instruction that the jury should return their verdict for the defendant on that ground. But as the case must be remanded for a new trial we need not express our opinion upon evidence which may not assume the same aspect upon a new trial."

If the car was not "in use" within the terms of the Safety Appliance Act at the time plaintiff was injured his action must fail, because but for the statute he will

be held to have assumed the risk incident to the act he was attempting to accomplish.

If the car was "in use" within the terms of the Act, yet defendant urges that the action must fail because of plaintiff's contributory negligence established as a matter of law by the evidence.

Plaintiff knew the exact condition of the coupler when he was between the cars. He knew that the defective coupler would not couple automatically with its fellow. He attempted to couple the cars by trying to push the coupler over with his hand at the moment the cars at his signal came together. The defective coupler "jumped" and failed to work. He again gave the signal, again the coupler "jumped" as before. He made a third attempt, with the same result. He signalled another time, but instead of trying to force the coupler into position with his hand, as he had in each instance previously done, he used his foot for that purpose, and again the coupler "jumped" toward him and his foot was caught and injured. The cars were about two and one-half feet or three feet apart when the signals were given. (Trans. Rec. pp. 29, 30, 31, 38, 39.) The car was located on a curve sufficiently acute that the engineer two car lengths distant could not see plaintiff at the side of the car. (Trans. Rec. p. 45.)

It is upon those acts of plaintiff, testified to by him, that defendant asks the court to declare plaintiff guilty of contributory negligence as a matter of law. If the car was subject to the Safety Appliance Act at the time plaintiff was injured, the defense of assumed risk is denied defendant under the language of the Act, but

not so the defense of contributory negligence. Between these defenses is a marked distinction; or, as stated by Mr. Justice Day in Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, "the question of assumption of risk is quite apart from that of contributory negligence."

That defendant may avail itself of the defense of contributory negligence is well stated by Hook, J., in Denver & R. G. R. Co. v. Arrighi, 129 Fed. 347, 348:

> Prior to the time when the act of Congress became fully operative, the employes of a railroad company subject to its provisions, engaged in coupling cars used in moving interstate traffic, but not equipped with automatic couplers, assumed the ordinary risks and hazards of that employment, and the company was not liable to them for injuries resulting therefrom. The common-law doctrine of the assumption of risk was then applicable. But a new rule is prescribed by the act. It specifically provides that the employes shall no longer rest under the burden of that assumption in respect of any car used contrary to its provisions. While this is true, the railroad company is not thereby deprived of the defense of contributory negligence. With an exception, unnecessary to be noted here, the risks and dangers of an employment which at common law are assumed by the employe are not those which arise from the negligence of either party. And when the burden of those assumed risks and dangers were lifted from the employe by statutory enactment, and cast upon the railroad company, there was not transferred therewith a responsibility for the negligence of the employe himself. The rationale of the doctrine of assumption of risk is not that which supports the rule of contributory negligence. They operate differently, and are dependent upon widely differ-

ent principles. Railroad Company v. McDade, 24 Sup. Ct. 24, 48 L. Ed. 96; St. Louis Cordage Company v. Miller (C. C. A.) 126 Fed. 495. It cannot be assumed that by the passage of a salutary law designed for the protection of those engaged in hazardous occupation Congress intended to offer a premium for carelessness, or to grant immunity from the consequences of negligence. The reasonable conclusion is that the defense of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with its requirements."

In discussing the conduct of plaintiff in the Arrighi case and in declaring it contributory negligence as a matter of law, the Court stated:

"The plaintiff adopted the most dangerous method of performing his duty. He took hold of the link of the approaching car with his left hand to guide and direct it, and, having done so, he simply left his hand between the drawheads until his fingers were crushed by the impact. His attention was not momentarily distracted; the moving car did not approach more rapidly than he calculated; he did not stumble or lose his balance, nor was he unable to see clearly; he was not unfamiliar in any degree with the character of the appliances about which he was engaged; and it does not even appear that he endeavored to remove his hand. In fact, if the plaintiff had declared that he made no effort to remove his hand from between the drawheads, he would not have added much to the force of the facts and circumstances shown by the record. The plaintiff himself was the principal witness in his own behalf, and the conditions which we have recited were shown almost wholly by his own testimony. The conclusion is irresistible that the plaintiff's injury was caused by his

> own want of proper care, and was not the result of the ordinary and usual risks and dangers of his employment. Bearing in mind the limitations upon the power of the trial court in respect of the defense of contributory negligence, we are nevertheless of the opinion that upon the evidence then before it the instruction requested should have been given."

The facts in the Arrighi case were not more favorable to defendant than are the facts in the case at bar.

Further considering the distinction between assumption of risk and contributory negligence in its application to the eighth section of the Safety Appliance Act, reference is made to Mr. Justice Brewer's dissenting opinion (concurred in by Mr. Justice Peckham, Mr. Justice McKenna and Mr. Justice Day) in Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1, 15, as follows:

> "This, while removing from the employee the burden of any assumption of risk, does not relieve him from liability for contributory negligence. For the rule is well settled that while, in cases of this nature, a violation of the statutory obligation of the employer is negligence *per se*, and actionable if injuries are sustained by servants in consequence thereof, there is no setting aside of the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless that statute is so worded as to leave no doubt that this defense is also to be excluded. Taylor v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308; Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886; East Tennessee, V. & G. R. Co. v. Rush, 15 Lea, 145, 150; Queen v. Dayton Coal & I. Co. 95 Tenn. 458, 30 L. R. A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; Reynolds v. Hindman, 32 Iowa

146; Caswell v. Worth, 5 El. & Bl. 849; Buckner v. Richmond & D. R. Co. 72 Miss. 873, 18 So. 449; Victor Coal Co. v. Muir, 20 Colo. 320, 26 L. R. A. 435, 46 Am. St. Rep. 299, 38 Pac. 378; Holum v. Chicago, M. & St. P. R. Co. 80 Wis. 299, 50 N. W. 99; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347; Winkler v. Philadelphia & R. R. Co. 4 Penn. (Del.) 80, 53 Atl. 90. The Interstate Commerce Commission held this to be the rule in reference to this particular statute. 14 Ann. Rep. 1900, p. 84. Indeed, it is not contended by the majority that the defense of contributory negligence has been taken away.

That there is a vital difference between assumption of risk and contributory negligence is clear. As said by this court in Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. Ed. 96, 100, 24 Sup. Ct. Rep. 24, 25: "The question of assumption of risk is quite apart from that of contributory negligence." See also Union P. R. Co. v. O'Brien, 161 U. S. 451, 456, 40 L. Ed. 766, 770; 16 Sup. Ct. Rep. 618. This proposition, however, is so familiar and elementary that citation of authorities is superfluous."

To the same effect is the language of Circuit Judge Taft in Narramore v. Cleveland, C. C. & St. L. R. Co., 96 Fed. 298, 304, as follows:

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensa-

tion, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it."

In Southern Pacific Company v. Pool, 160 U. S. 438, Mr. Justice White, delivering the opinion of the Court, held that a car repairer who went under a car which was standing on a track with a train in front of it, with the certainty that a caboose was to be attached to the rear, without putting out a flag or other signal warning of his being under the car, in order to protect himself, and who could have both heard and seen the caboose backing slowly toward him in ample time to enable him to get from under the car, was guilty of contributory negligence which precluded recovery for his death, although he relied upon a warning which he expected would be given by another car repairer who remained on the side of the track.

Applying these principles to the facts here presented, we conclude, following the line of argument in the Schlemmer case, that while but for Section 8 of the Act plaintiff in going between the cars to make the coupling would have assumed the risk thereof, yet by reason of Section 8 defendant is not permitted to avail itself of that principle in asserting its defense. Thus far plaintiff was protected by the Act. His negligence came later, and consists in attempting to make the coupling between the cars in a manner shown to be exceedingly dangerous by three immediately preceding attempts,

any one of which should have convinced him that injury would inevitably follow the method employed by him, and from which his injury resulted. Three separate times the coupler had jumped toward him at the moment of impact. He was controlling the movement of the car by signals communicated to the engineer. The two cars between him and the engine were connected together and with the engine. The space between the car with the defective coupler and the car with which coupling was sought was two and one-half feet to three feet. Reasonable minds should come to but one conclusion in considering plaintiff's conduct in trying to make this coupling, and that conclusion is that such conduct was recklessly negligent.

In Karrer v. G. H. & M. Ry. Co., 43 N. W. 370, the Supreme Court of Michigan held that where a brakeman in attempting to make a coupling undertook to elevate a drawbar with his knee and failing to lift it high enough its edge slipped on the edge of the drawbar of the other car and he was injured, he could not recover, saying—

> "It was the plaintiff's duty to examine into the coupling arrangements of both cars before he attempted to couple them, and as they were only a rod apart at most before he started the train back and as he says the defect was visible at once to any one looking, one or two seconds would have furnished all the time needed to satisfy himself had he been acting under any one else's orders and not for himself; but as he had personal direction of the engine's movements and could move when he pleased, the case as he presents it was an aggravated one of the grossest carelessness, for which he and no one else was responsible. The circum-

stances were more against him than in any of the similar cases in which we have held the plaintiff to the duty of examining his surroundings for himself."

In closing, attention is called to Toledo, St. L. & W. R. Co. v. Gordon, 177 Fed. 152, the facts there being substantially as follows:

At night a train of defendant's had broken in two twice in the same place owing to defective couplers, which while coupling automatically, would not hold. On the second occasion the head brakeman went alone to the place of separation, and after signalling to the engineer two or three times to move forward, and back slowly, he came apparently from between the cars and gave a quick signal to back, which was done, but in the meantime he had gone between the cars and was caught and killed between the drawbars as the cars came together. The Circuit Court of Appeals of the Seventh Circuit, Anderson, District Judge, delivering the opinion, held—

"We can conceive of but three possible explanations for deceased's conduct: First, he may have deliberately placed himself in the position in which he was killed. This would be suicide and is not to be presumed; the presumptions are against it; second, he may have attempted to pass to the other side of the drawbars after giving the signal to back and thus got caught. The closeness of the drawbars together when the signal was given and his position when found might indicate an effort to pass through sidewise; or, third, he may have given the wrong signal; that is, he may have intended to give the signal to pull forward, may have thought he had done so, and then gone in to examine the coupler further. If the accident hap-

pened in any one of these ways there can be no recovery. Indeed, upon any possible view of the case made by the evidence the decedent was guilty of negligence which contributed to his own injury and death."

IV.

Another error urged by the railroad company in the Circuit Court of Appeals, but n decided by that Court by reason of the reversal of the case on other grounds, is as follows:

PLAINTIFF'S COUNSEL WAS GUILTY OF MISCONDUCT HIGHLY PREJUDICIAL TO THE RIGHTS OF DEFENDANT.

The language of counsel for plaintiff, the objections by counsel for defendant, and the court's rulings thereon, are as follows:

"'The plaintiff in this case (referring to an opinion of the Supreme Court of Mississippi he had begun to read) was very badly hurt, and it was urged in the Supreme Court that the verdict was excessive, that the amount was unusual and unreasonable and that the court ought either to remit it—that is the practice I believe in this court if a large verdict is given—the court ought either to remit it or grant a new trial.'

"Mr. Trimble: 'I submit that your honor will give the jury all the law they require on that subject and I object to Mr. Percy reading any law books to the jury.'"

"Mr. Percy: 'I am reading them to the court also.'"

"The Court : 'Is it proper to read facts to the jury.'"

Mr. Percy: I am not going to read any facts. In considering the reasonableness of this verdict, Judge Campbell in this opinion said: 'We apprehend that but few, if any persons would submit to the injuries sustained by the appellee for that sum.' In other words, consider how you might be affected yourself—

Mr. Trimble: I object to that as an improper measure of damages.

The Court: Of course the Court will tell the jury that is not the measure of damages. If counsel desires to make that kind of statement, the jury will hear it and then the court will tell them what the law is as he understands it.

Mr. Percy: I call attention to these decisions as being of weight, but in view of what the Court has said and in view of the objection of my exceedingly technical friend, lest some error might creep into the record by reason of his objection, I withdraw the remark, gentlemen of the jury, and request you will not consider it.

"'I have here the first case that reached the Supreme Court of the United States in which this act was construed, the case of Johnson v. The Southern Pacific Co. It was decided in 1904. The act was passed in 1893, and carriers got extension after extension of time, and so it was that no case for final decision ever came to the Supreme Court of the United States until the Johnson case got there, and in the Johnson case it was insisted that he was not entitled to recover because he got hurt in a dining car and the dining car only ran part of the way through a state and then hooked on to another train and ran part of the way on that, and that therefore, it was not engaged in interstate commerce and he couldn't recover. What did the court say about it? The Court said in dis-

cussing the case, that they must look to the whole scope of the act; that they must look to the humanitarian purpose embodied in the act. The Court says: 'President Harrison in his annual message of 1888, 1889, 1890, 1891 and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injury due to prevailing methods of coupling and braking. (Continues to read from the decision.)

(Defendant objects.)

The Court: I understood counsel was addressing the court.

Mr. Trimble: Your honor had already ruled that you would submit the case to the jury, there's no other question before the court except what the jury will decide; this has nothing to do with anything that's to go to the jury and I object to it.

The Court: Counsel will keep himself within the rules.

Mr. Percy: I think it perfectly competent; I hate to be trimmed down.

The Court: If you are addressing it to the Court, the court will hear you, if it pertains to the subject.

Mr. Percy: If your honor says it isn't pertinent to this case, I will stop.

The Court: It is pertinent to the policy of the law; everybody concedes the policy of the law to be proper. I shall sustain the exception.

Mr. Percy: Well, this is some mighty good law and awful good facts, coming from a very sound opinion.

> The Court: Yes, I agree to all that; the point he makes is, that it has no application to this case at this time."

That such misconduct is highly prejudicial and has been severely condemned by this court, lower courts and state courts throughout the country, and should be here as severely condemned, is shown by the following authorities:

The practice of reading from law books to a jury has been condemned by a number of adjudged cases, among which are, People v. Anderson, 44 Cal. 70; Fuller v. Talbot, 23 Ill. 357, 776 Am. Dec. 695; Sprague v. Craig, 51 Ill. 288; Reich v. New York, 17 N. Y. Week Dig. 141; Allare v. Allare, 39 N. J. L. 113; Koelges v. Guardian L. Insurance Company, 57 N. Y. 638.

As to the substance of the language used by plaintiff's counsel the following cases are cited:

In Manufacturing Company v. Woodal, 115 Tenn. 605, 90 S. W. 623, an attempt had been made by plaintiff to prove that defendant was insured against liability by accident. There was also a reference to that fact in the argument of counsel in his concluding address to the jury. The trial judge declined to discharge the jury on objection, but instructed them that they should not consider that part of the argument. The Supreme Court in reversing the case, stated—

> "It is true the counsel after the admonition of the trial judge to the jury that they should not consider 'consider that part of the argument' already quoted sought to withdraw it; but the harm had been done, and neither admonition upon the part of the court, nor withdrawal by the counsel, could

neutralize it. Manigold v. Black River Traction Company, Sup. 80 N. Y. Supp. 861; Iverson v. McDonald, 36 Wash., 75, 78 Pac. 202."

In Hall v. United States, 150 U. S. 76, the District Attorney in his closing argument to the jury made use of the following language:

> "We know what kind of trials they have in the State of Mississippi of a white man for killing a negro. We know from reading the newspapers and magazines that such trials there are farces. We are not living in Egyptian darkness but in the light of the nineteenth century. The defendant came from Mississippi with his hands stained with the blood of a negro and went to the Indian country and in less than four months had slain another man."

This Court, Mr. Justice Gray delivering the opinion, stated:

> "The presiding judge by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it, and thereby committed a grave error, manifestly done to prejudice the defendant with the jury, and which therefore was a proper subject of exception, and having been duly excepted to entitled him to a new trial."

In Waldron v. Waldron, 156 U. S. 361, another case involving the subject and effect of improper argument to the jury, consisting, in part, of statements of the law of other states, Mr. Justice White delivering the opinion of the Court, stated:

> "It is elementary that the admission of illegal evidence over objection necessitates reversal, and

> it is equally well established that the assertion by counsel in argument of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, also ground therefor."

In Chicago City Railway v. Math, 114 Ill. App. 350, the following language was held ground for a new trial:

> "There is no recompense that can in any way compensate a father or parent for the loss of a child. There is no money—nothing under the sun."

In Missouri, K. & T. Ry. Co. v. Nesbit, 88 S. W. 891 (Court of Civil Appeals of Texas), the following language was used by counsel for the injured party in his opening argument to the jury:

> "You may give this child a verdict for $5,000.00 or for $25,000.00, and in my opinion as a lawyer our appellate court would sustain either verdict. If you should give a verdict that is too small it would not be raised up, but if you should give a verdict that is too large the appellate court will correct it by cutting it down. Therefore, if you err, you should err on the side that can be corrected by the appellate court."

The appellate Court in considering the error assigned, said:

> "But the conclusive reason for holding such argument reprehensible is that it is impossible to determine the extent to which a verdict may be affected thereby, and the fault cannot therefore be cured by requiring a remittitur. Such language is a most insidious temptation to a jury, and it is doubtful if its effect can be withdrawn by any action on the part of a trial court."

In Wabash Railroad v. Billings, 212 Ill. 37, 72 N. E. 2, an action for injuries at a crossing, the evidence for defendant tended to show that plaintiff was guilty of contributory negligence. Plaintiff's counsel stated that powerful railroad corporations ignored the rights of citizens, maiming or killing them at pleasure, and then bring in servants to swear them through. The jury returned a verdict for $5,000.00. Plaintiff's injuries consisted of a fracture of an arm, a scalp wound and a sprained foot, and plaintiff remitted $2,000.00 from the verdict. The appellate court held that although the trial court instructed the jury to disregard the remarks of counsel, the remarks were cause for reversal, notwithstanding the *remittitur*, as the prejudice shown by the excessive verdict might have entered into the determination of their issues.

In Florence Cotton & Iron Company v. Field, 16 Sou. 538, (Sup. Ct. Alabama) the counsel for plaintiff in his argument before the jury said that defendant corporation was composed of northern captalists who had come south to speculate on property of the inhabitants and were now trying to rob a southern gentleman of his justly earned salary. The court sustained the defendant's objection, remarking to the counsel that it was improper, and the latter thereupon attempted to withdraw the remark. In the opinion the appellate court said:

> "We have referred to it (the language) to state that the remark was calculated to seriously prejudice and injure the defendant with the jury, and the action of the court in excluding it was very mild and not a sufficient antidote to the poison that had been injected into the minds of the jury

by the use of such language. Verdicts ought not to be won by such methods and when an attorney in the heat of debate goes to such extraordinary lengths generally, the court should promptly, set aside any verdict that may be rendered for his client. The repressive powers of the court to prevent such departures from legitimate argument of the case before a jury should be vigorously applied. No mere statement that it is out of order or improper can meet the exigencies of the case; nothing short of such action on the part of the court and the clear satisfaction that the prejudice naturally excited by the use of such language has been removed from the minds of the jury, ought ever to rescue the case for a new trial on the motion of the party against whom rendered.

In Britton v. Michigan C. R. R. Co., 76 N. W. (Michigan) 1043, involving a like question, the court held:

"It was error for him (counsel) to state to the jury facts based on his own observation, or to argue as proof that the piaintiff stopped before attempting to cross the railroad, that his counsel would not have commenced the action if he had not stopped. Nor should the jury been asked to give the plaintiff compensation for the expense of the litigation, or for trouble in prosecuting his claim. Had these things been promptly repressed we might have passed them by as an error without injury, but the record indicates that there was no effective restraint upon counsel."

In Selby v. Detroit Railway Company, 81 N. W. (Michigan), the statement made by counsel for plaintiff to which particular objection was made is as follows:

"I do not want you to go to the jury room to cut down on the ground there will be a settlement in

this case. They will go to the Supreme Court; they always go there."

The foregoing language was held error and one of the grounds for reversal in the case.

Particular attention is called to K. C. F. S. & M. Ry. Co. v. Sokol, 32 S. W. (Arkansas), wherein the language objected to by counsel for defendant in fully set forth, the colloquy between counsel for both parties and the court occupying a considerable portion of the record.

In further support of this proposition reference is made to Henry v. S. C. & P. R. Co., 30 N. W. (Iowa) 630; L. & N. R. R. Co. v. Smith, 84 S. W. (Kentucky) 755; Hillman v. Detroit United Railway 100 N. W. (Michigan) 399; Dillingham, et al, v. Coles, 14 S. W. (Texas) 566; Galveston H. & S. A. R. Co. v. Kutac, 11 S. W. (Texas) 127, G. C. & S. F. R. Co. v. Butcher, 83 Tex. 309, 18 S. W. 583; Cleveland Paper Co. v. Banks, 15 Neb. 20, 16 N. W. 833; Campbell v. Maher, 105 Ind. 383, 4 N. E. 911; Lindsay v. Pettigrew, 52 N. W. (South Dakota) 873; Galveston H. & S. A. Ry. Co. v. Cooper, 70 Tex. 67; 8 S. W. 68, and Union Pacific R. Co. v. Field, 137 Fed. 14, in which latter case are collected a number of cases in this court and in the lower courts directly in point on the question here considered.

Examining the record in this case the conclusion is inevitable that counsel for plaintiff did not desire to withdraw the effect of his unwarranted line of argument from the jury, neither did the court exercise that promptness and positiveness that might in a measure at least have withdrawn the sting of the improper language. The court said "if counsel desires to make that kind of

a statement the jury will hear it and then the court will tell the jury what the law is as he understands it."

As was said by Sanborn, J., in the Field case last cited, "In the case at bar the zeal of counsel for plaintiff carried him beyond the limits of fair argument, presented to the jury facts that were not in evidence, and insinuated a misleading measure of damages. The vice of his action was not extracted by retraction or by any specific charge of the court. It is not certain that it was not prejudicial to the defendant; nay, it is probable—almost certain that it was prejudicial. The trial therefore was not fair and impartial, and the defendant is entitled to another."

It cannot be said that the conduct of plaintiff in this case was clearly without prejudice. There was a verdict for $7,500.00 for injury to, not loss of, a foot, which the court felt called upon to reduce to $5,000.00. The court may have thought that the jury had acted upon the suggestion of counsel and found a liberal verdict, knowing that the court could set aside a portion of it. Counsel certainly gave the jury to understand that such was the practice of that court.

We submit that it is clear that error entered the record when counsel was permitted to inform the jury that the court would make the plaintiff remit if the verdict was too large, and again when he was permitted to read from law books. The defendant was entitled to a trial in which the jury were to feel responsible for their verdict, and in arriving at which they should only be influenced by the evidence, and the law committed to them by the court.

For the various reasons herein advanced we respectfully pray for a reversal of this cause.

W. F. EVANS,
E. T. MILLER,
Attorneys for Respondent.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

E. M. DELK, PETITIONER,
v.
ST. LOUIS & SAN FRANCISCO RAILROAD CO. } No. 88.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIÆ.

STATEMENT OF THE CASE.

This case was begun in the Circuit Court of the United States for the Western District of Tennessee. Plaintiff's declaration contained four counts, each of which was based upon an alleged violation by the defendant company of the act of Congress requiring the use by railroad companies engaged in interstate commerce of cars equipped with certain safety appliances (R., pp. 3, 4, 9). The jury returned a verdict for $7,500; a motion for a new trial was overruled,

and plaintiff having, at the suggestion of the court, remitted $2,500, judgment was entered for $5,000 (R., pp. 13, 14). Errors were assigned, and the cause was removed by writ of error to the Circuit Court of Appeals, Sixth Circuit. It was there heard by Judges Lurton (now Mr. Justice Lurton), Severens, and Richards, and was reversed by Judges Lurton and Severens on the ground that the trial court had given the law to the jury by stating the language of the statute in such a way as to lead the jury to suppose that it imposed an absolute duty to keep the car in order, and applied to the facts in this case (R., pp. 76–83). Judge Lurton was also of the opinion that the act of Congress was not applicable, because the car was not at the time in use in interstate commerce (R., p. 83). Judges Severens and Richards were of the opinion that it was being so used, and that the trial court did not err in so directing the jury (R., pp. 76, 84). Judge Richards dissented, expressing the opinion that "after the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law" (R., p. 84).

A petition for a rehearing was filed upon two grounds: First, that the alleged error in the court's

charge was not properly preserved; and, second, that the facts affirmatively show that the company did not use due diligence with reference to the coupler (R., p. 86). This petition was overruled without an opinion (R., p. 92).

After the opinion of this court had been handed down in the case of *St. Louis, Iron Mountain & Southern Ry.* v. *May Taylor* (210 U. S., 281), another petition for a rehearing was filed, in which it was insisted that this court had construed the statute in accord with the charge of the trial court, and contrary to the view expressed by the majority of the Circuit Court of Appeals (R., pp. 93–95). This petition was also dismissed, Judge Richards again expressing dissent (R., pp. 95, 96). The case was then brought to this court by a writ of certiorari.

STATEMENT OF THE FACTS.

The facts as stated by the Circuit Court of Appeals (R., pp. 75, 76) are as follows:

> The car alleged to be defective was what is known as K. C. F. S. & M. No. 21696. The car was loaded with lumber consigned from Giles, Ark., to Memphis, Tenn. The car arrived in Memphis September 28, 1906, at 4.30 p. m. and was delivered by the plaintiff in error to the Union Railway Co. at Memphis, commonly called "The Belt Line," October 2, for delivery to the consignee. The car was returned to the plaintiff in error by the Union Railway Co. of Memphis, October 3, at 7.30 a. m. on account of there being a defect in the coupling and uncoupling appliance on one end

of the car. The car was in a string of nine cars on what is known as the "dead track" in defendant's new yard. This dead track was a team track; that is, the track was so arranged that teams might load from or into the car into or from wagons hauled alongside the car.

On the morning of October 4, 1906, defendant in error, acting under instructions of the plaintiff in error, undertook to switch certain cars out of the string of nine cars so as to get two empty cars and three coal cars for removal to some other portion of the defendant's line. The cars were on a track extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The easternmost two cars, being empties, were left on the lead track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but owing to a defect in the coupler on the eastern end of the two cars attached to the engine the coupling could not be made without a man going between the ends of the cars. The defect on car K. C. F. S. & M. No. 21696 was this: The chain connecting the uncoupling

lever to the lock pin or lock block was disconnected, owing to a break in the lock pin or lock block. The drawbar also had a lateral motion of 4 inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers would couple by impact. In so doing his foot was badly injured. Plaintiff in error had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt Railway on account of the defect in the coupler, plaintiff in error's inspector placed a red card about 3 inches by 6 inches upon the car, and with a blue pencil wrote on said card "Out of order." This card is what is commonly known as a "bad-order" card. The car had been on this team track from 7.30 a. m. on the 3d until 10 or 11 o'clock on the 4th, when the accident to defendant in error occurred.

There was evidence tending to show that the inspection was made in the latter part of the 3d, and that the inspector thereupon ordered an employee to go to the repair shops, which were some 2½ miles distant, and get the material for repairing the coupler, but that the employee did not return until after the accident.

To this statement are added the following facts, which are undisputed:

(1) The track on which the defective car was standing was called the "dead track," because it leads off from a cemetery, and not because the cars placed

thereon were not in use (R., p. 23). With reference to the use of this track, Car Inspector Holmes, the company's witness, testified (R., p. 50):

> Q. Are trains made up out in this new yard? Do you separate trains and make trains up out there?
>
> A. On McLemore, one and two; yes, sir.
>
> Q. *It's used in general business out there, is it?*
>
> A. *Yes, sir.*
>
> Q. This team track, loaded cars were on it at that time and had been on it all the while, hadn't they?
>
> A. I guess so.
>
> Q. *Constantly in use; that is, you had to go in there and take cars off and put them back all the while?*
>
> A. *Yes, sir.*
>
> Q. Do they have to couple up cars on that track when they leave them?
>
> A. Have to couple them up or block them up.

(2) Although the car was returned to the company at 7.30 a. m., October 3, on account of the defect in question, and although it was placed upon a track which was "constantly in use," yet no attempt was made to repair it during that day, and the proper material was not sent for until the morning of the accident, it arriving about the time the accident occurred (Holmes, R., p. 48). That is, the car had been in the company's possession from September 28 to October 2, four days, apparently without an inspection, as there is no evidence of inspection during that time; it was returned to the company at 7.30

a. m. on the 3d because the coupler was defective, and thus *the company's attention was particularly called to its condition*, and 27 or 28 hours later the car was still unrepaired, and plaintiff in error's injuries were the proximate result thereof. *But, when the material arrived, the repairs were made within 10 minutes* (Holmes, R., p. 49).

(3) The coupling was attempted *under the direct orders of the company's foreman.* The company introduced its foreman, Mr. Walters, who testified (Rec., p. 54):

> Q. Were you foreman at that time?
>
> A. Yes, sir.
>
> Q. Did you direct this man, had you directed this man to go in and make that coupling?
>
> A. Yes, sir; I didn't make that coupling.
>
> The COURT. *But you directed him to do it?*
>
> A. *Yes; we was trying to pick that car up.*
>
> Q. The two of you were trying to pick that car up, you say?
>
> A. Yes, sir.
>
> Q. Didn't you have it a hold of the engine at that time? Wasn't the engine a hold of it at that time?
>
> A. I don't remember whether the cars was behind it or whether the engine had a hold of the car coupling on to the S. F. car or not; I don't remember just now.
>
> The COURT. *Do I understand you to say that you saw this card upon this crippled car and afterwards that you directed this man to go in and make this coupling?*
>
> A. *Yes, sir;* the card was on it, "Bad order, hold."

STATUTE.

The action is based upon section 2 of the act of March 2, 1893 (ch. 196, 27 Stat., 531), but as the caption and every section of the act may be regarded as material in construing these sections the entire act is here set forth as follows:

> An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.
>
> *Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not*

equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a

maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. (*As amended April 1, 1896.*) That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being

lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

I.

The car in question was being used in interstate commerce when the accident occurred.

The car was loaded with lumber at Giles, Ark., and consigned to Memphis. It was brought into Memphis by defendant, and by it turned over to the "Belt Line" for delivery to the consignee, but on account of the defect in question the "Belt Line" refused to handle it and returned it to defendant. It was not withdrawn from use, but was being temporarily held for repairs, *which could be and were made within ten minutes;* and which, had defendant exercised proper diligence, would have been made within an hour or two after the defect was pointed out by the "Belt Line," and the car again turned over to that line for delivery.

The case of *Johnson* v. *Southern Pac. Co.* (196 U. S., 1), is conclusive of this question. The plaintiff in that case was injured in attempting to couple an engine to a dining car standing on a side track. The dining car was used to furnish meals to passengers between San Francisco and Ogden. On the day of the accident the east-bound train was so late that it was found that the car could not reach Ogden in time to return on the west-bound train according to intention, and it was therefore dropped off at Promontory, to be picked up by that train as it came along that evening (p. 21). The plaintiff was a brakeman on a freight train, and on reaching

Promontory, Johnson was directed to uncouple the engine and couple it to the dining car for the purpose of turning it around preparatory to its being attached to the passenger train.

This court held that the statute was applicable to the car, saying:

> Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so *when waiting for the train to be made up for the next trip* (p. 22).

The following authorities cited by Judge Lurton to support his view that the safety-appliance act did not apply to this car at the time of the injury should, it is submitted, not be regarded as controlling.

In *Railway Co.* v. *Bowles* (71 Miss., 1003, 1008) the facts were that a number of crippled or defective cars were transported in a freight train to Water Valley, Miss., a repair point, in order that they might be repaired, and the car in question was being set out for that purpose, and while switching, the brakeman, in attempting to couple this car to another one, received an injury from which he died. Among other things, section 193 of the constitution of Mississippi provided: "Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby," except under certain circumstances to conductors and engineers. The court said:

> It was not being used by the company as a car for the transaction of its business, but

> *was being transported as a disabled car,* condemned to the repair shops, and had reached the yard of the company, from which it was to be shifted to the shops. The deceased, *dealing with it as a disabled car,* and controlling, by his will, the action of the engineer, called for the engine to be backed, and without examination stepped between the cars, on one of which there was no drawhead, without regard to their condition, and apparently oblivious to the imminent and deadly peril to which he exposed himself by giving the signal to back the train and instantly getting in between the defective cars.

But further said:

> If, in the prosecution of its business, it (the company) had used crippled cars, and an employee required to handle such cars had been injured, the provision of section 193 of the constitution would have applied. But that provision has no application to the case of a car *transported over the line of the company to its shops for repairs,* and which has reached the place of its destination.

Taylor v. *Boston & M. R. Co.* (188 Mass., 390) involved a similar state of facts, and it was there held that a certain statute forbidding a railroad corporation to haul a car not equipped with automatic couplers "in moving traffic between points," and providing that an employee who is injured by any locomotive, train, or car used contrary to its provisions should not be deemed to have assumed the

risk of such injury, did not apply to a car being moved to a repair shop to be repaired.

In the present case the car *was not being handled when the accident occurred as a disabled car, or for the purpose of having repairs made, nor was it removed from the course of commerce*, but, while still laden with interstate merchandise, was temporarily placed on a sidetrack waiting for a few minutes work to be done, and then to be delivered to the consignee, and was being constantly shifted back and forth by engines engaged in moving other loaded cars to their destination.

The case of *McLaughlin* v. *Union Railway Co.*, decided by the Court of Civil Appeals of Tennessee, has not been reported; hence the facts therein can not be stated, nor does it appear what disposition was subsequently made of the case by the Supreme Court of that State.

II.

The act prohibits all use of cars in interstate commerce which are not at the time of the use equipped with automatic couplers in working condition.

1. *This court has already in effect so decided in St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor (210 U. S., 281).*

The accident which gave rise to that case resulted from a failure to maintain the drawbars on a car used in interstate commerce at the height prescribed by section 5 of the safety-appliance act. Liability was sought to be avoided by showing that "drawbars

which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repairs, devices called shims, which are metallic wedges of different thickness, are employed to raise the lowered drawbar to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded." On the strength of this evidence the railroad company asked the court to instruct the jury "in substance that if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and if the lowering of the drawbars resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible." The refusal of this instruction was assigned as error and urged in this court as a ground upon which the judgment should be reversed. This court held, however, that the instruction was properly refused, saying:

> In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry. Co.* v. *Delk*, 158 Fed. Rep., 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee

reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation can not clarify them and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature *was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it* (*pp. 294–295*).

While this language was used in reference to the section of the act prescribing the height of drawbars, yet the language of the sections relating to couplers is precisely the same in substance, and must be given the same construction. Unquestionably, the inten-

tion was that the duty should be equally strict in each case. It is suggested, however, that the opinion was *dictum* so far as it related to the ruling on the instruction there under consideration, because the lower court's action upon the instruction was held to be right, and its judgment was reversed on another ground. Such contention, however, is without merit. Both rulings of the lower court were assigned as errors by the railroad company; both questions were properly before the court and fully argued, and each was carefully considered and expressly decided. On the second trial this latter question would again arise, and it therefore became important that it be settled for the guidance of the trial court. If the case had been reversed on both grounds, the rule of *stare decisis* would have applied to each, and the effect can not be different because one question was decided adversely to the plaintiff in error.

This question was settled by this court in the case of *Railroad Companies* v. *Schutte* (103 U. S., 118). That case involved facts identical with those in the case at bar (so far as the claim that the former decision was *dictum* is concerned), and this court said:

> As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in

> the case was finally dismissed, because it was not proved that any of the State bonds had been sold, the decision was in no just sense *dictum. It can not be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the case, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended* (p. 143).

In *Union Pacific Co.* v. *Mason City Co.* (199 U. S., 160, 166), upon the same subject this court said:

> Of course where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other. *Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum.* (*Railroad Companies* v. *Schutte*, 103 U. S.)

2. *No other construction can be adopted without doing violence to the very clear and explicit language of the statute.*

As will be hereinafter shown, it is only in the Sixth Circuit that the construction of this statute

insisted upon by appellee has been adopted; and in view of the recognized ability of that court, it is believed that every reason which can be found to support such a construction was fully stated in the opinions in this case and in the subsequent case of *United States* v. *Illinois Central R. Co.* (170 Fed., 542), in which that court adhered to the view expressed in the present case.

It is well, then, before commenting upon the language of the statute, to understand precisely what that court construes it to mean. It does not deny that the statute is absolute in its requirements. It agrees with the many other courts in following what they conceived to be the rule laid down by this court in the *Taylor* case, that the statute is obligatory in its terms, and when violated no successful defense can be interposed to prevent the recovery of damages resulting directly therefrom, unless it be by showing contributory negligence. But, it differs materially from those courts, and, it is insisted, from this court, with reference to the *scope* of the statute, in this:

While other courts hold that the statute requires not only that the cars be equipped with the couplers and the other appliances designated, but also that the equipment be *maintained continuously* in a safe and usable condition, this Circuit Court of Appeals holds that the statutory requirements cease with the equipping of the cars and keeping them equipped with the *character* of couplers and other appliances mentioned; and do not charge the company with the duty of inspection, or require that the equipment be kept in

repair. In other words, the requirement of the statute is met, with reference to couplers, if the company attaches to the car a coupler of the proper *type*, and keeps such coupler attached thereto, but the company is not bound to keep the coupler continuously in repair. That this is the view of the court is clearly shown by the following quotations from its opinions in this and the *Illinois Central Railroad Co.* cases. In the case at bar (Rec., pp. 80, 81; 158 Fed., 936) the court said:

> When we come to the enactment itself we find that in the second section it corresponds with what the title has heralded. It forbids the use of cars which have not been equipped with automatic couplers, which are a little more fully defined by adding that they are to be such as will obviate the necessity of going between the cars to uncouple them, or, as we are disposed to think, couple them. *And this is all there is of the statute which by direct language imposes the duty upon the carrier in respect to the use of automatic coupling. But it is necessarily implied that the railroad company shall keep up the equipment, for it forbids the use of the cars without it.*

And, again:

> One of the recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and another is that it is not to be presumed that the statute was intended to displace the former law whether it be statute or common law, further than was fairly

necessary to give it place and operation. Now, prior to this enactment other methods were employed by railroad companies for coupling their cars, generally, if not universally, by a link and pins. And the law was that in respect of this coupling the company was bound to exercise that reasonable degree of diligence in keeping them in repair which was proportionate to the danger of their use. The rule was expressed in various forms, but that was the substance. Conceiving that the new form or method of automatic coupling by impact would mitigate the danger to employees, it enacted this statute *to compel the carrier to substitute the new form for the old in operating its cars;* and of course it is necessarily implied that it shall be done in good faith, as is always implied in the enactment of laws. *If the carrier does this, it has complied with the requirement of the statute and the old method is displaced by the new.*

In the *Illinois Central Railroad Co.* case (170 Fed., 549) the court said:

Now, as an original proposition we are unable to understand why it was, if Congress intended to enact such a law as it is now contended this law is, it should, after having proposed to itself the enacting a law "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers," and having used fitting language to carry that purpose into effect *and nothing more, have failed to declare*

that, having so equipped its cars with the couplings, the carrier should be required at all times and in all circumstances, when in use, to have them in effective condition. To hold that Congress has done this is to insert an interpolation into the act, and to make this interpolation such as shall require things confessedly impossible and to be apologized for by saying, as counsel for the Government insist that we should, the law is so written; that it is a matter for the legislature, and not for the courts, to determine. Is this a proceeding to be justified in order to make the statute mean what the counsel think the law ought to be? *It seems clear to us that Congress, having accomplished its purpose by requiring carriers to equip their cars in the manner prescribed and to continue such equipment, was content to leave the incidents of their use to be regulated by the rules and principles of the common law.*

And, further:

On the argument, counsel for the Government, when asked what language of the act created the absolute duty contended for, referred to the last clause in section 2, which is, "and which can be uncoupled without the necessity of men going between the ends of cars," as if that language constituted an independent requirement. *But this language is descriptive of the equipment required, and imports nothing in regard to the duty of the carrier when from accident or some other cause without his fault the equipment becomes deranged. And because the statute does not make any command in that regard, the general law supplements*

> *the duty of the carrier by declaring that he shall use the utmost diligence in having the defect corrected. By this harmonious cooperation of statute and common law the intended result is worked out without any unjust consequence.*

The theory which is here so clearly stated is the only one that can with any reason be advanced against the contention that the statute requires the appliances to be kept in repair, because the word "diligence," or one having a like meaning, appears nowhere in the act; and the duties imposed thereby are absolute and are not subject to measurement by any degree of diligence. That this is true clearly appears from the language used in each of the several sections, as follows:

> SEC. 1. * * * it shall be unlawful for any common carrier * * * to use on its line any locomotive engine * * * not equipped with a power brake and appliances for operating the train-brake system, or to run any train * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Necessarily, under the latter clause of this section, it is left to the jury as a question of fact to determine whether the train contains a sufficient number of equipped cars to enable the engineer to control it with the power brakes.

> SEC. 2. * * * it shall be unlawful for any such common carrier to haul or permit

> to be hauled or used on its line any car * * * not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.
>
> SEC. 4. * * * it shall be unlawful for any railroad company to use any car * * * that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.
>
> SEC. 5. (After providing for the establishment of a standard height of drawbars for freight cars) * * * no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Now, let us inquire by what process of reasoning the learned Court of Appeals reached the conclusion that the apparently unambiguous language used in these several sections does not require that the equipment, when the car is being hauled, shall be, *at that time*, capable of use.

It was substantially admitted by the court that, if given its natural meaning, the act requires that the couplers be kept in repair; but the court felt that it was its duty "to consider the conditions to which the statute applies. And if it be seen that in its practical application doubt and difficulties arise, it becomes its duty to scrutinize the statute and resolve whether by a sensible construction of it those difficulties may be avoided." The doubt is respectfully suggested whether the mere *difficulty* of applying an act is ever

sufficient warrant for a court to undertake to modify the obvious meaning of its language. It may be different where its application is impossible; but here there is no difficulty in applying the statute in the precise language used. This court found none in the *Taylor* case, in so applying the fifth section, and a like application of the second section is no more difficult. It may be, however, that the enforcement of the act as written will cause some inconvenience at times to railroad companies, and will shift the hardship arising from an accident from the injured employee to the railroad company; but that renders *the application of the act by the courts* no less easy.

Having determined that there were inherent difficulties in applying section 2 of the act as written, and that it ought to be tempered if possible by construction, the court took recourse to the title of the act which reads "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers, etc.;" and said:

> The general purpose is to promote the safety of employees and travelers, but the immediate purpose of the act is to prescribe a way of doing this, namely, by compelling common carriers to equip their cars with automatic couplings. The method or means by which the ultimate good is expected to be accomplished is the subject of the enactment. The safety of the employees, etc., is a thing beyond, an expected result of the enactment,

> which latter is the substantive thing before us for interpretation. True, we should have regard to the result intended for it, but we can not carry into it words foreign to its meaning, or strain those used beyond their fair import (158 Fed., 935).

The court here correctly says that the general purpose of the act was *to promote the safety of the employees and travelers*, and the body of the act was designed to prescribe a way of doing this; but it is a rule of construction of universal application that the purpose of an act must be kept steadily in mind, and that such reasonable meaning shall be given the language which prescribes the method as will *best* promote the accomplishment of the object for which the act was passed. Here this rule was disregarded by the court, and the inference is that because the matter Congress had *directly* in hand was the prescribing of a method for promoting the safety of employees and travelers on railroads, and the purpose of the act was in a way remote, such purpose was entitled to but little consideration. It is also true, as the court said, that the result intended will not justify carrying into an act words foreign to its meaning or straining those used beyond their fair import, but it is equally true that when the obvious meaning of the act will best accomplish the intended result, no strained construction should be adopted which will in a measure impair its effectiveness.

As demonstrated by the court, it was perfectly proper to look to the title in order to determine what the purpose of the act was. But the court did not

stop there; it not only informed itself of the general object of the act from the title, *but it adopted the language of the title rather than that of the body of the act to determine the details of the method by which the object was to be accomplished.* It is obvious that when the purpose of the act was declared in the title, no importance was attached by the draftsman to the meager recital therein of what railroad companies were to be required to do in order to secure the desired result. That was left to be set forth in detail in the enacting clauses. But the court, finding that the method suggested in the title was not so radical and comprehensive as that specifically described in the act, in that it was there recited that the desired end was to be accomplished "by compelling common carriers * * * *to equip* their cars with automatic couplers," etc., in effect substituted this recital for the enacting clause, and held that the real thing aimed at was to have railroad companies *equip* their cars as required, but that the *maintenance* of the equipment in such a condition as would admit of their use was a matter of such little importance that it was not in the minds of Congress at all.

This practical substitution of the caption for the act was thus accomplished by the court:

> In this connection it seems proper to refer to the last clause in section 2, which is "and which can be uncoupled without the necessity of men going between the ends of the cars." *We understand this to be a part of the description of the type of the automatic couplings with which the cars must be equipped.*

That is, the matter with which Congress was specially concerned was the *type* of the coupler that should be in use, and not whether it would actually couple or uncouple in the manner described in the statute. But this is wholly disregarding the object for which the act was passed, to wit, "to promote the safety of employees and travelers on railroads," for of what interest can it be to the employee that the car have the proper *type* of equipment, if at the time of the use it is in such condition that it can not be coupled in the manner required? While out of repair, on account of its complexity, such a coupler is far more dangerous to the employee than one of the old style, and yet such a construction, in the absence of proof of negligence in making inspections, would bar from recovery the employee injured by such a coupler, though wholly incapable of use, because the coupler was of the general class mentioned by Congress; when if hurt in the use of an old-style coupler in a perfect condition, the company's liability would be absolute.

That the use in the title of the act of the phrase "to *equip* their cars with automatic couplers," etc., without mentioning repairs, is entitled to but little or no consideration in construing section 2, is further shown by the fact that the title of the act remains precisely the same as when the act was reported to the Senate by the committee which had it in charge, while, as will be hereinafter shown, this section was very materially amended during the debates with reference to this very matter.

Clearly the mere style of coupler was, in the mind of Congress, a mere incident, and what it intended to require was that when a railroad company should, after the date named, haul a car, it should be equipped with a coupler that would then and there couple automatically, and could be uncoupled without the necessity of employees going between the cars; and it is respectfully insisted the language of the act, *as written in its body*, can not with reason admit of any other interpretation.

The contention that the act contemplated primarily the *style* of the coupler, and not that it should be in workable condition, was, it is submitted, expressly repudiated by this court in *Johnson* v. *Southern Pac. Co.* (196 U. S., 1, 16, 17). The court there said:

> It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car, but that the couplers on each, which were of different types, would not couple with each other automatically by impact so as to render it unnecessary for men to go between the cars to uncouple and couple.
>
> Nevertheless the Circuit Court of Appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. *But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars*

> *to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other.* The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.
>
> If the language used were open to construction, we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow.

There can be no difference in principle between using automatic couplers in good condition, but which will not automatically couple because they are of different types, and in using such couplers of the same type which will not couple because one or both are out of repair.

The construction given the statute by the Circuit Court of Appeals takes the teeth out of the act. The first section requires the locomotive to be equipped with proper brakes, and that such number of cars in a train be equipped with such brakes "that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." According to the construction of the Court of Appeals, Congress did not intend to here require that the train could be

actually controlled by the engineer, but that sufficient cars therein should be equipped with power brakes, that, *if they were in good condition*, the train could be so controlled. Every brake might be out of repair and the engineer absolutely helpless, and yet *the requirement of the statute* be met.

So, under section 3, which makes it lawful for a company having its cars equipped with power brakes to "refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars," the fact that the brakes on the car offered will not work will not justify the company in refusing the car, provided the brakes are of the proper *type*, and would work if in good condition. And section 4, which makes it unlawful for a company to use a car "not provided with *secure* grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars," does not mean that the handhold shall be actually secure and be of assistance to the men when used, but only that it shall be of such *type* that if in repair it would be secure and of assistance to the men.

The reasoning by which the Circuit Court of Appeals reached its conclusion in this case with reference to section 2, would apply with equal force to section 5, which provides that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard (height of drawbars) above

provided for." The language of section 2 is equally positive in that it makes it unlawful to haul cars not equipped with couplers coupling automatically, and which can be uncoupled without the employee going between the cars. But, as above shown, this court held in the *Taylor* case that the car must *at the time of the use* comply with the standard, and that it was not sufficient for it to have once complied therewith, and for the men to have been provided with "shims," by which the drawbar could have been kept at the proper height from the rail.

But let us see to what ultimate result the theory of the learned Circuit Court of Appeals leads, and whether that theory was not repudiated by that court itself in the *Illinois Central* case, although it was there announced with equal clearness as in the present case.

As heretofore shown, the theory of the court is that the *statute* requires only that the proper equipment shall be provided, and kept on the car, but that this statutory requirement is supplemented by the common law, which requires that the company shall exercise proper diligence in keeping the equipment in repair. That is, the *statute* does not extend to the matter of repairs at all, but they are controlled entirely by the principles of the common law. If this is true, what is to become of section 6 of the act, which provides "that any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car,

in violation of any of the provisions of this act," shall be liable to a penalty. If the statute does not extend to repairs, when a company shows that the train had a sufficient number of cars equipped with power brakes to enable the engineer to control the train, *if the brakes were in a good condition;* or that the cars complained of were equipped with a coupler *of the proper type;* or that a grab iron *of the right kind* was attached to the car, or that the drawbar *once* complied with the standard, its defense to an action brought under this section is complete, though the brakes, couplers, grab irons, or drawbars may be wholly incapable of use because out of repair.

The penalty can be imposed only for violations of the *statute*, and not for violations of the common law. Yet, in the *Illinois Central Railroad* case, though the court announced the theory above stated in the most positive terms, and assigned it as the reason why the company's duty to keep its cars in repair was not absolute, yet in direct antagonism to that theory it held that the company is liable for hauling cars with *defective* couplers, where there has been negligence either in discovering or in repairing the defect. In this connection the court said (170 Fed., 548):

> In effect we concluded that if the defect had occurred at some previous time and the defendant had knowledge of it, or should, with reasonable diligence, have had notice of it, and with such knowledge, actual or implied, continued, without some justifying necessity, to haul the car upon its tracks while laden

with goods which were the subject of interstate traffic, it would thereby violate the statute. We still concede that to be so. We think, further, that the railroad company would be liable if it starts in transit a car with a coupling containing a defect which could have been discovered by inspection; and vice versa, if a car when started in transit had no discoverable defect, the railroad company would not be liable to the penalty for a use of the car in the same transit by reason of a defect occurring during transit, provided there has been no subsequent lack of diligence either in discovering or in repairing the defect.

We are of opinion that when the Government has proved that a car laden for interstate traffic and with defective couplings has been hauled upon its tracks the railroad company is bound to prove exculpatory facts, such as that it has used all reasonably possible endeavor to perform its duty to discover and correct the fault.

Here the company's liability is made to turn wholly on the question of diligence in discovering the defect and in repairing the same, or removing the car from the train, when the statute says nothing about diligence, and the court had held that the duty of exercising diligence in this particular was a common-law and not a statutory duty.

The same difficulty arises with reference to the eighth section of the act, where it is provided—

> That any employee of any such common carrier who may be injured by any locomotive, car, or train in use *contrary to the provisions of*

> *this act* shall not be deemed to have thereby assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Under the theory of the Circuit Court of Appeals, this section applies only to cars which do not possess equipments of the kinds described, and does not include risks arising from the want of diligence in making inspections and repairs, and in fact has no application to the present case. Yet neither that nor any other court has given any intimation that this section should or could be so restricted.

Since, therefore, the theory upon which the Circuit Court of Appeals based its decision can not with justice and reason be applied to some of the most important provisions of the act, it should be repudiated altogether.

The view expressed by the court that a literal application of the law would work an immeasurable hardship upon railroad companies is not, it is submitted, entitled to very great weight.

Occasions can be conceived when it would be practically impossible for a repair to be made before using the car, as where a defect arises between stations, but such is not the case here presented, and in practice it is exceedingly rare that any such condition would arise, provided the companies use due diligence in having the cars inspected. Furthermore, no injury can happen between stations to employees from defective couplers, because there can be no occasion to use

them. But suppose one should suffer an injury without negligence upon his part from a defect arising between stations and before opportunity to remove the car from the train. Under the common law, neither party being negligent, the entire burden of the injury would fall upon the employee. Is, then, a statute specially harsh which shifts the loss to the company, when by so doing it will inspire the company to the highest diligence in inspecting the cars hauled by it, and will thus reduce to a minimum the possibility of such accidents? And if it be thought that an extreme case of this kind would work a hardship upon the company, is it sufficient to justify a strained and unnatural construction of the language of the statute, and by so doing emasculating it of its chief source of power, and in a large measure prevent the accomplishment of the purpose for which it was enacted?

The profession and the courts are so familiar with, and have such reverence for, the principles of the common law, that they are slow to see that its rules sometimes impose very severe hardships. Exact justice would say that if one of two persons, acting in concert and in the interest of both, sustains an injury, both being free from negligence, the burden should be equally borne by each; but the common law says it must be borne entirely by the one upon whom the injury falls. Is that rule less harsh than the one which says that it shall be borne entirely by the other party, especially when such party is the better able to bear it and in a better position to prevent the

injury from happening? Industrial conditions have become wholly revolutionized since those principles were evolved. The stagecoach and the oxcart have been supplanted by the express train and the endless chain of heavily laden freight cars drawn by monster engines over a network of railway lines extending from ocean to ocean. Nor is the "servant" longer attached to the soil, but he is held in the same esteem as the "master," and with equal solicitude are his interests guarded by both the legislature and the courts. And, when in view of these changed conditions, Congress has undertaken to establish a rule for the government of those engaged in carrying interstate commerce, should that rule be modified by construction on the theory that Congress could not have meant what it said, because the principles of the common law are different?

But as to what consideration should be given the argument that the construction here contended for by plaintiff in error would impose an unreasonable hardship upon the railroad companies, no language more forceful and convincing can be used than that of this court, speaking through Mr. Justice Moody in *St. Louis, I. M. & S. Ry. Co.* v. *Taylor* (pp. 295 and 296), as follows:

> It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written,

unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute as thus construed imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe drawbar, there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that

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regard. Such a policy would be intelligible and, to say the least, not so unreasonable as to require us to doubt that it was intended and to seek some unnatural interpretation of common words.

3. *The act is remedial, and should be construed in such way as to best effectuate its purpose.*

(1) The necessity for legislation to protect trainmen concerned in the movement of interstate traffic against the constant danger arising from the use of cars not equipped with the prescribed safety appliances need hardly be dwelt upon. Statistics showing the result of the legislation furnish the best argument on that point. According to the statistics recently gathered by the Senate Committee on Interstate Commerce during its consideration of House bill No. 5702 (which is supplementary to the safety-appliance act), in the year 1893, in which the law was passed, 9,063 out of a total of 179,636 trainmen in the United States were killed and injured in coupling casualties. That is to say, one trainman out of every 20 was killed or injured in coupling casualties during that year. The same report shows that in 1908, by which time the equipment with safety appliances had been completed and rigid enforcement of the law had begun (the lower courts in several cases having decided that the duty imposed by the law is absolute, and such decisions having been confirmed by the ruling of this court in the Taylor case, in May of that year), the number of coupling casualties was reduced to 3,385, *although the number of trainmen had*

increased to 281,645 and the total number of casualties of all kinds had increased both in actual number and in proportion to the number of men employed. In other words, in 1908 only one trainman out of every 83 (as against one out of every 20 in 1893) was killed or injured as a result of coupling or uncoupling cars, although over 13 per cent of all employees (as against less than 12 per cent in 1893) were killed or injured in one way or another. (S. Rept. No. 250, 61st Cong., 2d sess.) The remedial character and beneficent operation of the law could not be better demonstrated than by these figures.

(2) That the act was in fact passed for the promotion of the safety of trainmen concerned in the movement of interstate traffic is indisputable.

(*a*) The title of the act shows it. It reads "An act to *promote the safety of employees and travelers* upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers," etc.

(*b*) The history of the act shows it. The demand for the legislation was so imperative that both the Democratic and the Republican platforms of 1892 declared for it. President Harrison repeatedly called for it in messages to Congress. The Interstate Commerce Commission urged it at every opportunity, and the employees never ceased demanding it. Always the reason given was that the measure was necessary to put an end to a menace to trainmen, which, as President Harrison said, rendered his occupation as dangerous as that of a soldier in time of war.

(*c*) Finally this court decided in *Johnson* v. *Southern Pacific Ry. Co.* (196 U. S., 1) that "the primary object of the act was to promote the public welfare by securing the safety of employees and travelers" on interstate railroads.

(3) The act is far more remedial in character than other acts which have been held remedial by this court. Certain provisions of the customs laws, though they provide penalties for their violation, have been held remedial because enacted for the public good, and to suppress a public wrong. (*Taylor* v. *United States*, 3 How. 197, 210; *Rankin* v. *Hoyt*, 4 How. 327, 332; *United States* v. *Stowell*, 133 U. S., 1, 12; *Anglo-California Bank* v. *Secretary of the Treasury*, C. C. A., Ninth Cir., 76 Fed. 742, 748.) The thirteenth section of the national banking act of June 3, 1864, which provided that the knowingly receiving or charging a rate of interest greater than that specified should forfeit the entire debt, and giving a right of recovery of twice the amount of interest paid, was held remedial. (*Farmers Nat. Bank* v. *Dearing*, 91 U. S., 29, 35); and in *New Haven R. Co.* v. *Interstate Com. Commission*, 200 U. S., 361, 391, this court said:

> It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates,

preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

4. *The decision of this court in Railroad Co. v. Taylor has been interpreted by so many courts of the country as holding that the duties of railroad companies to equip and to maintain the appliances mentioned in the act in the condition required by its terms, is absolute, that it has become a fixed principle of law; and to now hold to the contrary would be to unsettle a principle which is recognized, and has been enforced, in practically all parts of the United States, except in the Sixth Circuit.*

As a matter of convenience, the decisions of the various courts construing this act are briefly set forth, as follows:

United States v. *Denver & R. G. R. Co.* 163 Fed., 519, (C. C. A. 8th Cir.,) was an action brought by the United States to recover penalties for violation of the act, and the case had been disposed of in the trial court by sustaining a demurrer to the complaint. One objection to the complaint was that there was no allegation of a failure on the part of the company to exercise reasonable care in maintaining the coupler in operative condition. The court, speaking through Judge (now Mr. Justice) Van Devanter, upon this question said:

> The third objection is that there is no allegation of any failure on the part of the

> defendant to exercise reasonable care in maintaining the coupler in operative condition. It must also fail, because the duty which the statute imposes upon a railroad company in that regard is not qualified by the common law rule of reasonable care, but is absolute, as has been recently and authoritatively settled in *St. Louis, Iron Mt. & Southern Ry. Co.* v. *Taylor* (210 U. S., 281).

Chicago, M. & S. P. R. Co. v. *United States*, 165 Fed., 423, 426 (C. C. A., 8th Cir.), was an action to recover penalties. Judgment had been rendered by the trial court against the company on four counts, but the correctness of the judgment was questioned only as to the first and fourth counts. With reference to the first it appeared that a coupling had been pulled out of a car in a wreck, and it, while empty, had been chained to the adjoining car, and while thus forming a link in a train of cars was hauled to the company's general repair shops in another State. The court affirmed the judgment. Under the fourth count it was shown that a coupler was found to be defective while a switch engine was engaged in distributing the train. The judgment as to this count was also affirmed, the court, speaking through Judge Hook, saying:

> There was no proof of such an inspection of the car while it was at rest on the exchange track as would have disclosed the condition of the coupling appliance, and there was no proof indicating the defect was caused while the switching crew were performing their

duties. It can not, therefore, be inferred that the finger or lifting key might have been broken at the time it was discovered to be out of order. The duty of defendant under the statute is an absolute one, and is not discharged by the exercise of reasonable care. The case is controlled by the principles announced in *St. Louis, Iron Mountain & Southern Railway Co.* v. *Taylor* (210 U. S., 281).

United States v. *Southern Pacific Co.*, 169 Fed., 407, 409 (C. C. A., 8th Cir.), was an action to recover penalties for hauling cars with defective couplers. On the trial the court had charged in substance that a movement of cars with appliances out of repair, only for the purpose of having them repaired, and no further than was reasonably necessary to accomplish that purpose, was not a violation of the law. In considering this portion of the charge, Judge Adams, speaking for the court, said:

> As a corollary to the classification so made we reached and stated the conclusion that any movement of vehicles after they became defective, for the purpose of repairing them, must, in order to escape the penalties imposed by the act, be "wholly excluded from commercial use themselves, and from other vehicles which are commercially employed." Conformity to the requirements of the law, as so interpreted, it must be admitted, will often be inconvenient and sometimes impracticable; but Congress had before it for consideration the important question of promoting the safety of employees and travelers upon railroads, and in the accom-

> plishment of its purpose it may well be that the legislative mind considered the inconvenience and impracticability of a literal compliance at times with the law, and the consequent infliction of the light penalties imposed for its violation to be of little moment compared with the greater importance of protecting life, limb, and property. Drastic measures are frequently necessary to protect and safeguard the rights and interests of the people.

In *Chicago, B. & Q. R. R. Co.* v. *United States*, 170 Fed., 556, 557 (C. C. A., 8th Cir.), which was an action to recover penalties for defective couplers, the trial court had charged that the duty of the railroad company is absolute, and that want of knowledge of the defect was no defense, and the court, speaking through Judge Adams, said:

> It was held by us and in our opinion it was necessarily held by the Supreme Court in the *Taylor* case, that the duty of railroads under the statute in question is an absolute duty, and not one which is discharged by the exercise of reasonable care or diligence.

Atch. T. & S. F. Ry. Co. v. *United States* (2 cases), 172 Fed., 1021 (C. C. A., 8th Cir.), were actions to recover penalties for not maintaining appliances. The court affirmed the judgments below, saying:

> This question, and all other questions in these cases, have been repeatedly considered and decided, and upon the authority of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Taylor* (210 U. S., 281, 294, and other cases cited) the judgment below must be affirmed.

Donegan v. *Baltimore & N. Y. Ry. Co.*, 165 Fed. 869, 871 (C. C. A., 2d Cir.), was an action brought to recover damages for personal injuries, which the proof tended to show resulted from the use of a coupler in such defective condition that the brakeman had to go between the cars to operate it. When plaintiff had closed his testimony, the trial court, on motion of the defendant, dismissed the complaint. The court of appeals, speaking through Judge Noyes, said:

> The defendant's liability for any injury caused by such violation of the statute was absolute, and not dependent in any degree upon its negligence. *St. Louis, etc. Ry. Co.* v. *Taylor* (210 U. S., 281).

And the judgment of the court below was, therefore, reversed.

Atlantic Coast Line R. Co. v. *United States*, 168 Fed., 175, 186 (C. C. A. 4th Cir.), was a suit brought by the United States to recover penalties. One ground of demurrer was that the complaint did not allege negligence upon the part of the company in inspecting and repairing its safety appliances. The Court of Appeals, in an extended opinion delivered by Judge Pritchard, in which the case of *St. Louis, I. M. & S. Ry. Co.* v. *Taylor* was relied upon for authority, held that the duty of the railroad company to maintain its appliances in a good condition was absolute, its conclusion being expressed in the following language:

> It was the manifest intention of Congress, in the enactment of this statute, to require all

> common carriers engaged in interstate commerce to keep their cars and engines at all times equipped with proper safety appliances. The degree of diligence required by the statute is of the highest order, and the duty thus imposed is absolute and unconditional. Therefore any failure on the part of a railroad company to comply with its requirements must necessarily subject the railroad company to the penalty imposed.

In *Norfolk & Western R. Co.* v. *United States*, 177 Fed., 623, 625 (C. C. A. 4th Cir.), an action to recover penalties for hauling certain cars with defective couplers, and also other cars unequipped with grab irons, the Court, upon this question, said:

> That the duties imposed upon railroad companies to equip their cars with the safety appliances required by these acts is an absolute one, and relief from the penalty for noncompliance can not be obtained by showing reasonable care and want of intentional violation, we regard as fully determined by this court in *Atlantic Coast Line R. Co.* v. *United States* (94 C. C. A. 35, 168 Fed., 175).

The act has been similarly applied by district judges in the following cases:

In *United States* v. *Phila. & R. R. Co.* (162 Fed., 403) Judge McPherson of the Eastern District of Pennsylvania overruled a motion for a new trial, the ground of the motion being alleged error in his charge in stating in substance that the duty of the railroad company to keep its cars equipped with safety appli-

ances in good condition was absolute, the court saying:

> It is true that the *Taylor* case was an action against the railway company to recover damages for the death of an employee, while the present suit was brought by the United States to recover a penalty for failure on the part of the defendant to keep certain safety appliances in good order; but the same section of the safety-appliance act was construed by the Supreme Court as is now in question, and the construction there put upon it supports the instructions that were given to the jury and are now complained of.

At the same time, and for the same reason, Judge McPherson overruled motions for new trials in *United States* v. *Phila. & R. R. Co.* (162 Fed., 405), *United States* v. *Pennsylvania R. Co.* (162 Fed., 408), and *United States* v. *Lehigh Valley R. Co.* (162 Fed., 410).

United States v. *Erie R. Co.* (166 Fed., 352, 354), was an action in the district of New Jersey brought by the United States to recover penalties for hauling three cars having defective couplers and one car without a handhold. There was a verdict in favor of the Government on all the counts, and Judge Lanning, in passing upon a motion for a new trial, said:

> Section 2 of the act of March 2, 1893, requires the common carrier not only once to equip a car used in interstate traffic with couplers of the kind described, but to

> keep it so equipped. The duty imposed can not be qualified by saying that the carrier, after having once supplied lawful couplers, is bound to use only a high degree of skill to maintain them in perfect condition.

United States v. *Wheeling & L. E. R. Co.* (167 Fed., 198, 201) was an action brought in the Northern District of Ohio to recover penalties, and Judge Tayler, in passing upon a demurrer to the complaint upon the question of the company's duty to maintain the equipment of its cars, said:

> There are approximately 2,000,000 cars in use by railroads in this country, and if the contention referred to is sound, it would be necessary in order to sustain a cause of action in cases under this act that proof be made that the appliance was in a condition of unrepair at one time, that it continued to be in that condition of unrepair or in a developing condition of greater unrepair up to another time, the lapse of the intervening time being so great as to show a want of ordinary care on the part of the railroad company. In the meantime the very thing to prevent which the law was passed might occur, to wit, the injury of an employee. The practical administration of justice would be denied, and the real enforcement of the law be impossible if the construction contended for was sound. But it has been held in several cases that even as a defense on the merits no degree of care, no absence of negligence, can excuse for the failure to perform a duty unqualifiedly imposed by statute. And in the recent case of *Railway Co.* v. *Taylor, Adm'x*

> (decided May 16 of the present year by the Supreme Court) (210 U. S., 281, 28 Sup. Ct., 616, 52 L. Ed., 1061), the court very pointedly lays the unqualified responsibility upon the railroad for such a condition of unrepair.

It appears, therefore, that Judge Tayler followed the decision of this court in *Railway Co.* v. *Taylor*, rather than the opinion of the Circuit Court of Appeals of his own circuit in the case at bar.

In *United States* v. *Atch. T. & S. F. Ry. Co.* (167 Fed., 696, 697), Judge De Haven of the Northern District of California, in charging the jury upon this question, said:

> You are instructed that section 2 of the safety-appliance act (act March 2, 1893, c. 196, 27 Stat. 531, U. S. Comp. St. 1901, p. 3174) imposes upon the defendant an unqualified duty to equip its cars with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars; and if the defendant hauled over its lines of railroad any cars which could not be so operated, either by reason of being improperly equipped or by reason of the original equipment being out of order or disconnected, or otherwise inoperative, your verdict should be for the Government as to each and every car so hauled.

In that case and in the case of *United States* v. *Southern Pacific Co.* (*id.* 699), Judge De Haven gave certain instructions with reference to the right of the company to haul cars in trains carrying interstate

commerce to a repair point, and also the duties of the company with reference to establishing repair points at proper places at reasonable distances apart, the correctness of which is denied, but which has no substantial bearing upon the present question.

In *United States* v. *Baltimore & Ohio R. Co.* (170 Fed., 456, 458) Judge Orr, of the Western District of Pennsylvania, charging the jury, after quoting the provision imposing a penalty for violation of the statute, said:

> The construction placed by the courts upon that act has been somewhat various, and I have given the matter considerable attention. I am of the opinion, and so instruct you, that that act imposes upon a common carrier the absolute and imperative duty of having its cars used in interstate commerce equipped in the manner required by the act.
>
> It has been argued here that the railroad company should not be responsible except for want of ordinary care in keeping its appliances in order, and that it would be a great hardship upon the railroad company to hold otherwise. I say to you that the exercise of reasonable care by the railroad company to keep the cars equipped with the appliances required by the act will not excuse the railroad company from its default.

In *United States* v. *Southern Ry. Co.* (170 Fed., 1014) Judge Boyd, of the Western District of North Carolina, in charging the jury, said:

> The law, according to the construction which has been placed upon it by the courts

> of the land, imposes upon the carrier these duties which are said to be absolute, and this court so interprets this law. The hauling or using, therefore, on the part of a carrier engaged in interstate commerce, of any cars, tenders, locomotives, or other rolling stock used in carrying on interstate commerce which are not equipped with this coupling I have described, *or where this coupling apparatus is in a state of unrepair rendering it inoperative, is a violation of the law.*

In *Hohenleitner* v. *Southern Pacific Co.* (177 Fed., 796, 797), which was an action to recover damages for personal injuries which resulted because two cars would not couple automatically on account of the sharpness of the curve, Judge Bean, of the district of Oregon, in charging the jury, said:

> This law has been frequently before the courts for construction and application, and without referring to the adjudications in detail it is sufficient for the purposes of this case that it requires all cars regularly used on any railroad engaged in interstate commerce, and all other cars used in connection therewith, to couple automatically by impact and to be coupled and uncoupled without the necessity of men going between them, whether they are loaded or empty, and although not actually engaged in such commerce at the time.
>
> * * * * *
>
> If the cars hauled or used by a carrier engaged in such commerce will not so couple, the law is violated, whether it is due to the character of the car, the kind of equipment

> used, or, in my opinion, the manner in which tracks employees are required to use in coupling or uncoupling cars or making up trains are located or built. The ultimate end sought by the law is the coupling and uncoupling of cars used in interstate traffic without the necessity of going between them.

United States v. *Baltimore & Ohio R. Co.* (Appendix, Kent's Digest of Decisions under the Federal Safety Appliance Acts, p. 264), was an action to recover penalties. Judge Dayton, of the Northern District of West Virginia, in charging the jury, said:

> The law is not satisfied by the exercise of reasonable care to this end, but the company must at its peril discover and repair all defects before moving a car from a repair point.

In *United States* v. *Atlantic Coast Line* (Appendix, Kent's Digest, p. 267), Judge Brawley, of the District of South Carolina, charged the following request at the instance of the United States:

> The safety appliance law of Congress imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances and grab irons or handholds in operative condition, and is not satisfied by the exercise of reasonable care to that end.

And in *United States* v. *Southern Ry. Co.* (Appendix, Kent's Digest, p. 270), Judge Brawley charged a like request.

In *United States* v. *Pennsylvania R. Co.* (Appendix, Kent's Digest, pp. 286, 287), Judge Orr, of the Western District of Pennsylvania, in charging the jury, said:

> By that act there is imposed an imperative duty upon each railroad company engaged in interstate commerce; that is, commerce between the States and not intrastate commerce, within the State, to comply with the provisions, and if a car is not equipped with couplers—the plural is used—coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, then the railroad company is liable.

In *United States* v. *Southern Pacific Co.* (Appendix, Kent's Digest, pp. 288, 289), Judge Farrington, of the District of Nevada, charged the jury that "the language of the act is absolute in its terms. It is made unlawful for a carrier to haul or permit to be hauled or used over its lines such a defective car in transporting its interstate traffic."

Against this array of authorities are the opinion of the Circuit Court of Appeals, Sixth Circuit, in the present case, and the opinion of the same court in *United States* v. *Illinois Central R. Co.* (170 Fed., 542), which was heard by Circuit Judge Severens and District Judges Sanford and Knappen, the opinion being delivered by Judge Severens; the opinion of Judge Evans in the court below in the same case (156 Fed., 182); and the views expressed by Judge Sater in charging the jury in *United States* v. *Baltimore & Ohio R. Co.*, Southern District of Ohio (Appendix, Kent's Digest, p. 271), and by Judge Cochran, while sitting in the Northern District of Ohio, in charging the jury in *United States* v. *Baltimore & Ohio R. Co.* (Appendix, Kent's Digest, 277, 282).

Therefore, the construction adopted by the Court of Appeals, Sixth Circuit, has not been followed by a single court outside of that circuit, and was disregarded by Judge Tayler within that circuit.

The State appellate courts which have had the act before them have agreed with the great majority of the Federal courts.

Carson v. *Southern Ry. Co.* (68 S. Car., 55, 70, 83) was an action brought to recover damages for personal injuries. There had been a judgment in favor of the plaintiff in the court below, and the trial court had charged the jury, in effect, that the duty of the railroad company to keep suitable appliances for running its trains, and to keep them in good condition, was absolute, and this part of the court's charge was objected to in the assignment of errors. The court, in passing thereon, said:

> The act of Congress in relation to couplings to cars engaged in interstate commerce, peremptorily demands that carriers of interstate commerce shall use automatic couplings to the cars used by them. This defendant was a carrier of freight of interstate commerce, and of course it was bound by the act of Congress, no matter what rules they may have adopted for the government of their servants. The circuit judge properly stated the rule. It is well known that Congress took control of these matters for wise purposes, among which was the protection of railroad employees.
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> It would be a want of wisdom and a disregard of law for this act of Congress to be emas-

> culated. Courts and the people of this country are obliged to adhere to and be governed by acts of Congress. *Of course, Congress intended that these automatic couplers should not only be provided and attached to cars, but that such appliances should be kept in proper repair for constant use.*

This case was removed to this court by writ of certiorari, but on the hearing the writ was dismissed (194 U. S., 136).

Brinkmeier v. *Missouri Pacific R. Co.* (81 Kans., 101, 107) was an action brought to recover damages for personal injuries. In the declaration as originally filed, recovery was not sought for violation of this statute. Subsequently, after the period of limitation had expired, the declaration was amended by inserting that ground, but it was held that the amendment came too late. The court, however, considered the effect of the safety-appliance act, and although it had previously held that its requirements were not absolute, yet in view of the decision of this court in the *Taylor* case, it overruled its former holding, and after quoting at length from the opinion in that case, said:

> The whole act either has for its purpose merely the regulation of the character of appliances to be used—the forms of mechanical devices to be employed—or it has a broader scope and is designed as well to shift the burden of accidental, nonnegligent injuries occurring in connection with such appliances from the injured employee, where the common law placed it, to the employer, in accordance with

> the modern theory that as a matter of legislative policy losses arising from injuries to workmen resulting from the use of complicated machinery should be counted as a part of the cost of production or operation. In declaring that "the obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just," the Supreme Court characterizes the whole act as one cast in the larger mold. Its interpretation is authoritative and final.

In *Neal* v. *St. Louis, I. M. & S. R. Co.* (71 Ark., 445, 450), which was an action brought to recover damages for personal injuries resulting from an alleged violation of this act, the trial court had peremptorily instructed the jury to return a verdict for the defendant. Upon the subject of the company's duties under the act, the court said:

> But it is different where the injury is caused by a violation of a statutory duty on the part of the master. The statute upon which this case is based does not say that the company shall use ordinary care to provide its cars with drawbars of a certain height, but it imposes as a positive duty upon railway companies that they shall do so. Where it is shown that the company has violated this statutory duty, that fact, of itself, makes out, if not a case of negligence *per se*, a *prima facie* case of negligence sufficient to go to the jury, if it be also shown that the injury was caused by this failure of the company. (3 Elliott, Railroads, sec. 1155; Dressler, Employers' Liability, sec. 51.)

5. *Congress has likewise construed the provisions of this act as absolutely prohibiting the use of cars, under any circumstances, if they are not equipped with the appliances therein provided for, in a workable condition.*

The act of April 14, 1910, chapter 160 (36 Stat., 298), is entitled "An act to supplement" the various safety appliance acts, describing them. By the second section of this act it is provided that after July 1, 1911, it shall be unlawful for a common carrier to haul, or permit to be hauled or used on its lines, any car subject to the provisions of the act, not equipped with secure sill steps and efficient hand brakes; and that all cars requiring ladders and running boards shall be equipped with both, and with secure handholds or grab irons on the roofs at the top of such ladders. Section 3 directs the Interstate Commerce Commission to designate the number, dimensions, etc., of the appliances provided for in section 2 thereof and by section 4 of the act of March 2, 1893, and to give notice of such designation; and also authorizes the commission to modify the standard of drawbars.

Section 4 of the act reads as follows:

> That any common carrier subject to this act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this act not equipped as provided in this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the act of March second, eighteen hundred and ninety-three, as amended April

first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this act or section six of the act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, *and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to;* and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

While this act is designed to secure alone the equipment of cars with the appliances therein described, yet a consideration of some of its features conclusively shows what Congress understood was meant by the provisions of the former acts.

(1) The fact that a special proviso was deemed necessary to permit the hauling of a car when in use from a point on the line of road where the defect is discovered to the "nearest available point where such car can be repaired without liability for the penalties imposed" shows that it was understood that in the absence of such proviso the company would be liable for the penalty for moving the car between such points.

(2) The clause "and nothing in this section shall be construed *to relieve* such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to" can leave no doubt that Congress understood when this act was passed that the previous acts, as well as the present one, rendered the company absolutely liable for injuries resulting to an employee from the presence in a train of a car having defective appliances, regardless of whether the company was chargeable with negligence or not or whether it was possible for the company to remove such car from its train before the injury occurred.

The word "relieve" necessarily implies that the liability mentioned already existed, and this clause was inserted to confirm that fact and to avoid the possibility that the courts might by implication hold that the proviso in section 4 would, under the circumstances mentioned therein, "relieve" the company of such liability.

Furthermore, the reference at the end of the clause to "the other acts herein referred to" emphasizes the understanding of Congress that the absolute liability, which, with the exception mentioned in the proviso, was created by this act, already existed under the provisions of the former acts.

(3) The concluding clause of this section—"and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight"—further emphasizes the understanding of Congress that no cars with appliances out of repair can be moved except under the circumstances mentioned in the proviso, because the method of hauling cars here mentioned ordinarily results from *defective* couplers, and it is declared that the proviso shall not be construed to *permit* the hauling of cars in that way, thus implying that in the absence of the proviso they could not be so hauled, and that their being so hauled was prohibited by previous acts.

(4) That there might be no doubt with reference to the understanding of Congress that the use of cars

under all circumstances except those designated in the proviso was, by the previous acts, prohibited, and its intent that, in any event, thereafter the safety-appliance acts should be so construed, it was provided in section 5 that—

> Except that, within the limits specified in the preceding section of this act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this act.

Here the language is so clear that no room for construction is given, it being impossible to draw any other inference than that the acts mentioned absolutely prohibit under all circumstances and conditions the use of cars except as specifically stated in the proviso.

While Congress can not, by a declaration in a subsequent enactment, make a prior statute mean, from its passage, something which no reasonable construction of its language would admit, yet a construction of an act of Congress by that body is entitled to great weight. In *United States* v. *Freeman* (3 How., 556, 565), this court said:

> If it can be gathered from a subsequent statute, *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.

But, certainly from the date of this last act, the positive and absolute duty rests on all railroad companies to maintain the safety appliances on cars handled by them in interstate commerce in good condition, as the meaning of its language can not be doubted. And, hence, to now hold that the act of March 2, 1893, required only that the cars be *equipped* with the proper *kind* of appliances, but did not require that these appliances be kept in repair, would overrule the decision of this court in the *Taylor* case, the decisions of at least three circuit courts of appeals, and a large number of circuit and district courts; and would disregard the construction placed thereon by Congress itself, when such a holding would affect only the few cases which have arisen, or shall hereafter arise, for alleged violations of the act prior to April 14, 1910.

6. *The holding that this statute imposes absolute liability is in consonance with many common-law principles and statutory requirements.*

At common law a common carrier of goods is held liable as an insurer, and no amount of diligence can release him from liability.

Again, every one is conclusively presumed to know the law, and if an officer in the best of faith makes an arrest in supposed compliance with his duty for the violation of a statute or ordinance committed in his presence, nevertheless, if the law or ordinance should afterwards be declared unconstitutional, he incurs liability for false arrest.

Wice v. *C. & N. W. R. Co.* (193 Ill., 351).
Mills v. *M. K. & T. R. Co.* (59 S. W., 874).

It has been held that a statute which requires a railroad company to fence its track creates absolute liability against the company neglecting to comply therewith for injuries resulting therefrom to an employee upon one of its trains even though the statute by its terms provides for no liability except for cattle, horses, sheep, and other stock straying thereon.

Donegan v. *Erhardt* (119 N. Y., 468, 473).
T. H. & I. Ry. Co. v. *Williams* (172 Ill., 379, 381).
Dickson v. *Omaha & St. L. R. Co.* (124 Mo., 140, 148).
Quackenbush v. *Wis. & Minn. R. Co.* (62 Wis., 411–414).

The constitutionality of this Missouri statute was before this court in the case of *Mo. Pac. R. Co.* v. *Humes* (115 U. S., 512), and it was there held that it did not violate the fourteenth amendment.

By the act of March 31, 1887, the legislature of Missouri imposed absolute liability upon railroad companies for damages arising from fire communicated by their locomotive engines, and in *St. Louis & S. F. R. Co.* v. *Mathews* (165 U. S., 1) the act was sustained as constitutional.

Other States have similar statutes which have been upheld.

In the brief filed on behalf of the Government in Case No. 329, *Chicago, Burlington & Quincy R. Co.* v. *United States* many cases are cited in which even criminal and penal statutes have been construed with equal strictness, and their validity sustained.

7. *The debates upon the act of March 2, 1893, while pending in Congress do not indicate that it was not the intention of Congress to require that the couplers and other appliances mentioned should be maintained continuously in a workable condition.*

The wisdom of the rule that the courts will not look to the debates in Congress in construing an act passed by that body was never better exemplified than in the present instance.

Counsel for plaintiff in error in No. 329 (*C., B. & Q. R. Co.* v. *United States*) quote various expressions made by Senator Cullom, who was chairman of the committee that had the bill in charge, and also from Senator White (now Mr. Chief Justice

White) and Senator Hoar; but a reading of the entire debate will show that these remarks have no bearing whatever upon the question here under consideration.

When the expressions quoted by counsel were made, the bill, as originally reported by the Senate committee, was under discussion, and the second section thereof read as follows:

> That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers *uniform in type and action*, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. *And said uniform automatic coupler shall always be of the standard type established by such common carriers controlling 75 per cent of the cars used in such traffic. Said common carriers shall report to the Interstate Commerce Commission within one year from the date of the passage of this act the standard type of automatic couplers so established, but on failure to do so the said commission shall designate and publish properly the type of couplers to be used.* (Cong. Rec., vol. 24, pt. 2, p. 1246.)

The parts printed in italics were subsequently stricken out.

It thus appears that the *uniformity of type* of couplers was specially emphasized in this section as reported by the committee, and there was a very

lengthy discussion of this feature running through a number of days. While it remained in this condition, the objection chiefly urged against it was the extensive cost of equipping the cars with a uniform type of coupler, it being insisted that there were patents upon these automatic couplers, and if the companies should be compelled to purchase a particular type, the patentee would increase the price to such an extent as to make it exceedingly burdensome to the companies; and to avoid this, Senator Morgan introduced an amendment requiring the United States to condemn and pay out of its Treasury for the patent in such type of coupler as might be adopted. This amendment, after extensive debate, was rejected.

While this matter was under discussion, nothing was said in regard to the duty of the companies to keep their couplers in repair, the debate being limited solely to the advisability of requiring the companies to adopt one particular type; and consequently, when the Senators used the expressions which are quoted, the question now before the court was entirely absent from their minds.

Subsequently, Senator Palmer suggested that that part of the section which is last italicized in the above quotation be stricken out; and in commenting upon the scope of the section as it would then read, he said:

> Mr. President, the law imposes upon the carrier the duty of providing couplers of the character indicated in the bill. If he fails

> to do so, he is subjected to the penalties imposed by the bill. The question is not to be determined in advance, but the carrier is to be punished if he fails to comply with the law. What is the necessity for a preliminary judgment? The carrier has a plain, precise, specific duty imposed upon him, and, as in every instance where a positive duty is imposed upon a citizen, he must find the means of discharging that duty. No preliminary determination is necessary. The law requires that the couplers shall be automatic, *that they shall couple and uncouple without the necessity of any switchman or brakeman going between the cars. It is at the peril of the carrier whether he complies with that law or not, and I propose to leave it just there, and punish those who disregard the law.* (Cong. Rec., vol. 24, pt. 2, p. 1332.)

And, on the following day, Senator Gray moved that the phrase "uniform in type and action" be also stricken out, which, when adopted, left the section standing precisely as it now appears in the statute; and as to its meaning when thus amended, Senator Gray said:

> This seems to prescribe to the railroad companies engaged in interstate traffic, and which are to be regulated by this act, a uniformity in type and action of these automatic couplers, when such uniformity is absolutely unnecessary to accomplish the end, which I understand to be the only justifiable end of this legislation, *and that is the protection of life*

and limb of the brakemen and those in the employ of the companies.

Leaving out those words, the section would read: "Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars."

I think we shall have accomplished by the amendment all that we may legitimately seek to accomplish, and shall not impose upon the railroad companies a condition which may have no reference at all to the end we have in view, but may very materially impair their ability to carry on the traffic which may be brought to their road.

For instance, suppose a railroad company receives every day, as all our great trunk lines are receiving, a lot of cars from another road, and though they may have the automatic couplers coupled by impact, which will not make necessary the interposition of the body of the brakeman to couple, they should not be uniform, what do we care whether they are uniform or not, if we accomplish the end that, in the language of this bill under my amendment prescribes, that they shall be automatic couplers, coupling by impact, *and which shall not make necessary the interposition of the body of the brakeman.*

Suppose a road, from caprice, from one of those antagonisms which comes from the

> fierce competition for traffic, should refuse cars which come from another road, even though they may have an automatic coupler, one that will couple by impact, one that will not make necessary the interposition of the body of the brakeman, and say, "This train is not uniform in the character of the coupler, in type or action, and therefore we refuse to receive it." I think that every extraneous and unnecessary condition should be eliminated from this bill, and that only those provisions should remain which are necessary to accomplish the great and humane end which this bill unquestionably has in view; that is, *the protection of the life and limb of the brakemen on the railroads.* (Cong. Rec., vol. 24, pt. 2, pp. 1375, 1376.)

If any expressions used in the debates upon this measure by Senators are entitled to any consideration in construing this section, they are certainly those made with reference to the effect of the section when stripped of those provisions which contemplated requiring the railroad companies to adopt a uniform type of coupler. But it is quite probable that the Senators who made the remarks just quoted did not have specially in mind the maintenance of the coupler after it had been placed upon the car. However, can it be doubted that if the question had arisen whether the section as it now reads required that the coupler *when placed upon the car* should be in a workable condition regardless of the type, and that it should be in such condition *when in actual use*, the response by every Senator would have been in the affirmative?

III.

Under the undisputed facts proven, defendant was liable even upon the construction of the statute given by the Circuit Court of Appeals.

Inasmuch as the Government is primarily interested in the construction of the statute, an extensive discussion of this phase of the case will not be entered into. In fact, nothing can be said with reference thereto in addition to what appears in the very able brief and argument filed on behalf of plaintiff in error in support of his petition for a writ of certiorari. It is submitted, however, that the facts proven admit of no inference which can under any circumstances or conditions exculpate the company. The car arrived in Memphis six days before the accident occurred, and it was held in defendant's possession for four days. It was then turned over to the Union Railway Co., which refused to accept it on account of the condition of the coupler, and returned it to defendant on the following morning at 7.30 o'clock. During that entire day no effort was made to repair the car, though the repairs could have been and subsequently were made within 10 minutes. Defendant did not remove the car from the course of commerce, but placed it where, in transacting the ordinary business of the road, it was necessary that it be continually shifted. About 10 or 11 o'clock on the following day, or a day and three hours after the defect had been pointed out to the defendant by the return of the car, the accident occurred. There is no attempt to explain why defendant was not informed of the defective condition of the coupler, and

did not repair the same during the four days it was in its possession, before it was delivered to the Union Railway Co., and it must be inferred, therefore, that no inspection was made during those entire four days, or if made, the repairs were deliberately and willfully neglected. Nor is there any excuse offered for the failure to make the repairs for a day and three hours after the car had been returned, except that the material for repairing the coupler was at the repair shops some 2½ miles distant; but this is no excuse whatever, for two reasons: (1) the material could easily have been obtained within an hour or two; and (2) in the meantime the car could have been placed upon a track where it would not have been necessary to handle it. Furthermore, when the accident occurred the company's foreman was present and directed plaintiff to make the coupling.

Under these facts the trial court should have directed a verdict for the plaintiff below, even under the construction of the statute contended for by plaintiff in error.

All questions of the constitutionality of the act will be considered in briefs filed on behalf of the Government in other safety-appliance cases.

The judgment of the Circuit Court of Appeals should therefore be reversed, and a judgment here entered affirming the judgment of the trial court.

J. A. FOWLER,
Assistant Attorney General.
BARTON CORNEAU,
Special Assistant to the Attorney General.
JANUARY, 1911.

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DELK *v.* ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 88. Argued March 9, 1911.—Decided May 15, 1911.

A car containing an interstate shipment, stopped for repairs before it reaches its destination and the cargo whereof is not ready for delivery to the consignees, is still engaged in interstate commerce and subject to the provisions of the Safety Appliance Acts.

Chicago, Burlington & Quincy Railway v. *United States*, *ante*, p. 559, followed to effect that under the Safety Appliance Acts of March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943, the carrier is not bound only to the extent of its best endeavors but is subject to an absolute duty to provide and keep proper couplers at all times and under all circumstances.

Prior to the amendment by the act of April 22, 1908, c. 149, 35 Stat. 65, the carrier had a defense where contributory negligence on the part of the party injured was the proximate cause of the injury. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Railway Co.*, *post*, p. 590.

Where the court instructs the jury to the effect that they must find for plaintiff in case they believe he acted as a reasonably prudent man with his experience would have acted, but that they must find for defendant if they believe the plaintiff acted in a manner a reasonably prudent man would not have acted, the question of contributory negligence is fairly submitted.

Where the Circuit Court rightly construed the law involved and there was no error in the admission of evidence, and the Circuit Court of Appeals reverses the judgment on a mistaken view of the law, there is no reason to disturb the verdict of the trial court and the judgment of the Circuit Court of Appeals will be reversed and that of the trial court affirmed.

THE facts, which involve the construction of the Safety Appliance Acts and the duties and rights of carriers and their employés thereunder, are stated in the opinion.

Mr. Luther M. Walter and *Mr. W. A. Percy*, with whom *Mr. T. F. Kelley* was on the brief, for petitioner.

Mr. Edward T. Miller, with whom *Mr. W. F. Evans* was on the brief, for respondent.

Mr. Assistant Attorney General Fowler, with whom *Mr. Barton Corneau*, Special Assistant to the Attorney General, was on the brief, for the United States as *amicus curiæ*.

MR. JUSTICE HARLAN delivered the opinion of the court.

The St. Louis and San Francisco Railroad Company, a Missouri corporation engaged in commerce as a carrier of freight and passengers through Tennessee and other States, was sued in one of the courts of Tennessee by the plaintiff in error, Delk, for damages alleged to have been sustained by him while engaged in the discharge of his duties as an employé of the company. On the petition of the railroad company the case was removed to the Circuit Court of the United States on the ground of diversity of citizenship.

The declaration contained several counts, but the basis of the plaintiff's claim is the alleged failure of the railroad company to provide proper automatic couplers, as required by the act of Congress of March 2, 1893, known as the original Safety Appliance Act. 27 Stat. 531. The company filed a plea, putting in issue the material allegations of the declaration. It also proceeded on the ground that the injuries complained of were caused by the plaintiff's own fault in not observing proper care in doing the work in which he was engaged when injured.

Upon a trial of the case in the Federal court there was a verdict and judgment in favor of the plaintiff for $7,500. The company moved for a new trial, and the trial court

indicated its purpose to grant that motion unless the plaintiff by remittitur reduced the verdict and judgment to $5,000. The plaintiff complied with that condition, and judgment was entered against the company for the sum last mentioned. In the Circuit Court of Appeals the judgment was reversed and the case remanded for a new trial. *St. Louis & S. F. R. Co.* v. *Delk*, 158 Fed. Rep. 931, 939, 940. Thereafter this court allowed a writ of certiorari.

The title of the Safety Appliance statute declared it to be "An act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." 27 Stat. 531, c. 196.

The provisions of the act, so far as it is material to set them out, appear in the opinion of *Chicago, Burlington & Quincy Railway Co.* v. *United States*, just decided, *ante*, p. 559. The Circuit Court of Appeals well said, in the present case, that while the general purpose of the statute was to promote the safety of employés and travelers, its immediate purpose was to provide a particular mode to effect that result, namely, the equipping of each car used in moving interstate traffic with couplers, coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.

The material facts out of which the suit arises and as to which there seems to be no dispute are these: The defendant company received lumber to be carried from Giles, Arkansas, to Memphis, Tennessee. In order that the consignee might receive the lumber, the car containing it was delivered, October 2, 1906, to the Union Railway Company, known as the Belt Line. But it was promptly returned the next day to the present defendant because of a defect in the coupling and uncoupling appliance on one end of it. The car in question was in a new

yard of the defendant company, and was in a "string" of nine cars on what is known as "the dead track" in that yard. This track was called a team track, because it was so arranged that teams might be loaded and unloaded from alongside it.

On the morning after the return of the car, October 4, 1906, Delk, acting under instructions of the agent of the defendant company, undertook to switch certain cars out of the string of nine cars, so as to get two empty cars and three coal cars for removal to some other part of the company's line. The remaining facts upon which the Circuit Court of Appeals proceeded cannot, that court said, be better stated than they are in the brief for the Interstate Commerce Commission, in whose behalf special counsel appeared in that court. Those facts are set out in the opinion of the court below as follows: "The cars were on the track extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track on to the lead track. The easternmost two cars, being empties, were left on the team track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn on to the lead track, the three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C., F. S. & M. No. 21,696 was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock

pin or lock block. The drawbar also had a lateral motion of four inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers would couple by impact. In so doing, his foot was badly injured. Plaintiff in error had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt Railway on account of the defect in the coupler, plaintiff in error's inspector placed a red card about three inches by six inches upon the car, and with a blue pencil wrote on said card, 'Out of Order.' This card is what is commonly known as a 'bad order' card. The car had been on this team track from 7:30 a. m., on the third until 10 or 11 o'clock on the fourth, when the accident to the defendant in error occurred. There was evidence tending to show that the inspection was made in the latter part of the third and that the inspector thereupon ordered an employé to go to the repair shops which were some two and a half miles distant and get the material for repairing the coupler, but that the employé did not return until after the accident. The trial court held that the Safety Appliance Act applied to the car with the defective coupler and that by virtue of § 8 of said act, plaintiff in error was denied the defense of assumption of risk on the part of defendant in error, and stated the language of the act to the jury."

The majority of the Circuit Court of Appeals (Judges Severens and Richards) held that the car, with the defective coupler, was, at the time of the injury in question and within the meaning of the act, engaged in interstate commerce. Judge Severens said: "The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for the delivery to the consignee wherewith the commerce would have ended.

Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and was being hauled upon its tracks when the accident occurred." Citing *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Chicago, M. & St. P. Ry. Co.* v. *Voelker*, 129 Fed. Rep. 522. Judge Richards said: "The car which caused the injury had a defective coupler. It would not couple automatically. As a result, the plaintiff below, under orders, went between it and the car it was to be coupled to, and tried to force a coupling by using his foot. In consequence, his foot was caught in the impact of the cars and seriously injured. . . . After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service, or that the company had sent for the required appliance, and would repair the car when it should be received. . . . This is a case peculiarly within the provisions of the act. A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked 'in bad order,' and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn; but it was not, and the company kept on moving it about in connection with other cars, and finally ordered the injured employé to couple it to another car. This he tried to do with the natural result, and he has been crippled

for life. The case amply justifies the verdict, and the judgment should be affirmed." Judge Lurton expressed the view that the car in question was not employed in interstate traffic at the time the plaintiff was injured; and he was also of opinion that that question was, under the evidence, for the jury. We concur with the majority of the court below that the car in question was being used in interstate traffic when the plaintiff was injured.

Nor were the Judges of the Circuit Court of Appeals in accord as to the meaning and scope of the Safety Appliance Act—Judges Lurton and Severens holding that the statute, reasonably construed, did not impose on the carrier an absolute duty to provide automatic couplers of the kind specified by Congress, and did not subject the carrier to the penalties prescribed, if it appeared that due care and diligence was exercised in meeting the requirements of the act. Judge Richards was of opinion that the statute did not make care and diligence on the part of the carrier ingredients in the act condemned, and that, independently of any inquiry as to its care or diligence, the carrier was liable to the penalty, if the coupler used was not, in fact, such a one as the statute required. The Circuit Court of Appeals, in its opinion, said that the trial court gave the law to the jury by stating the language of the statute, *but in such a way as to lead the jury to suppose that the statute imposed an absolute duty on the carrier to keep its cars in good order at all times.* An order was therefore made reversing the judgment of the Circuit Court and directing the case to be sent back for a new trial. But this court granted a writ of certiorari and the case is here primarily for the review of the judgment of the Circuit Court of Appeals.

The construction of the statute, adopted by a majority of the Circuit Court of Appeals to the effect that the act did not impose upon the carrier an absolute duty to provide and keep proper couplers at all times and under all circumstances, but was bound only to the extent of its

best endeavor to meet the requirements of the statute, has been rejected by this court in *Chicago, Burlington & Quincy Railway Co.* v. *United States*, just decided, *ante*, p. 559, and on the authority of that case we hold that the Circuit Court of Appeals erred in the particular mentioned.

One other matter requires notice, particularly in view of the decision to-day in *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, in which it is held that under the original Safety Appliance Act, and until that act was amended by that of April 22, 1908, 35 Stat. 65, c. 149, contributory negligence on the part of the party injured, where such negligence was the proximate cause of the injury, was a valid defence for the interstate carrier. It was contended at the trial of this case that the court erred in not instructing the jury, as matter of law, in accordance with the defendant's request, that the plaintiff was guilty of contributory negligence of such a character as to bar him from relief. The rule upon that subject is well settled by the authorities. It is that "when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury but may direct a verdict for the defendant." *Pleasants* v. *Fant*, 22 Wall. 116, 122; *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30, 32; *Randall* v. *Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 482; *Con. Mut. L. Ins. Co.* v. *Lathrop*, 111 U. S. 612, 615. In the *Doster Case*, it was said that where a cause fairly depends upon the weight or effect of the testimony, it is one for the consideration and determination of the jury under proper instructions as to the principles of law involved. These rules being applied in the present case, we are clear that the court would have erred if it had taken the case from the jury and directed a verdict for the company. The evidence in this case was by no means all one way. There was fair ground for difference of opinion, and

the court's refusal to instruct the jury, *as matter of law*, that the evidence established the defense of contributory negligence was right. We here give the charge of the trial court on the issue of contributory negligence: "If you conclude that he did that as a reasonably prudent man with his experience and his observation and the facts and circumstances in the case as I have detailed or undertaken to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct in the manner in which he attempted to couple that car, was such that a reasonably prudent man situated as he was under all the facts and circumstances that surrounded him there would not have attempted to do it, and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence, and that negligence, if you believe it, was the proximate cause of the injury, would be such as to bar him in this action, and that question I leave to you entirely without intimating any opinion about it." It thus appears that the question of contributory negligence was fairly submitted to the jury and it was decided against the carrier. Upon the effect of the evidence relating to contributory negligence by the plaintiff, the Circuit Court of Appeals declined to express any opinion, saying "as the case must be remanded for a new trial, we need not express our opinion upon the evidence which may not assume the same aspect upon the new trial."

In this state of the record what must be done with the case? As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for the review of the action of the

Circuit Court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267. In this view, the judgment of the Circuit Court of Appeals must be reversed, because, for the reasons above stated, it erred in not holding that the statute, under which the case arose, imposed on the carrier an absolute duty to provide its cars, when moving in interstate traffic, with the required couplers, and keep them in proper condition, and that, too, without any reference to the care or diligence which might have been exercised in performing its statutory duty. But on looking further into the record from the Circuit Court, we find that no error of law was committed by that court; for it proceeded on the construction of the statute which this court has approved in *Chicago, Burlington & Quincy Railroad* v. *United States*, just decided, *ante*, p. 559. Nor did the Circuit Court commit any error in respect to any issue of contributory negligence. It properly submitted that question to the jury. Therefore, the reversal of the judgment of the Circuit Court of Appeals, on the grounds we have above stated, constitutes no reason why the judgment of the trial court should be disturbed.

For the reason stated, the judgment of the Circuit Court of Appeals must be reversed; but as we do not perceive that any error of law was committed in the Circuit Court, to the prejudice of the carrier, the judgment of the latter court must be affirmed.

It is so ordered.

MR. JUSTICE LURTON did not participate in the decision by this court in this case.